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# Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?

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# CAN PLAINTIFFS USE MULTINATIONAL ENVIRONMENTAL TREATIES AS CUSTOMARY INTERNATIONAL LAW TO SUE UNDER THE ALIEN TORT STATUTE?

Bradford Mank\*

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## I. INTRODUCTION

The Alien Tort Statute (ATS)<sup>1</sup> provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>2</sup> This grant of jurisdiction is usually read narrowly to protect only the most fundamental international human rights such as those prohibiting torture or war crimes. Several courts have, in fact, been unwilling to accept broader claims to a right to life or a healthy environment and thereby have rejected environmental claims under the ATS.<sup>3</sup>

Contrastingly and in a major departure from existing law, the District Court for the Central District of California concluded in 2002 that under the ATS residents of Papua New Guinea had a cognizable tort claim against Rio Tinto, an international mining company, for allegedly polluting international waters with mining waste.<sup>4</sup> In reaching this decision, the court found that the United Nations Convention on the Law of the Sea (UNCLOS or the Convention),<sup>5</sup> which prohibits marine pollution affecting international waters, codified customary international law that may provide the basis of a claim under the ATS even though the United States has never ratified UNCLOS.<sup>6</sup> Even though it ultimately dismissed the case, the district court’s decision in *Sarei I* that UNCLOS constitutes customary international law cognizable under the ATS could enable plaintiffs to bring customary international law claims based on several Multilateral Environment Agreements (MEAs) that the United States has never ratified provided that a sufficiently large number of other nations have recognized that the agreement at issue implicates specific, universal, and obligatory norms of international law. Nevertheless, the court dismissed all of the plaintiffs’ claims as presenting nonjusticiable political questions.<sup>7</sup> The court alternatively dismissed the UNCLOS claim under the act of state doctrine and the doctrine of international comity.<sup>8</sup>

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<sup>1</sup> 28 U.S.C. § 1350 (2006). Some courts and commentators have referred to the statute as the Alien Tort Claims Act (ATCA), but the Supreme Court in a recent case referred to it as the Alien Tort Statute (ATS). *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004); see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 587 (2002) (characterizing the reference of the ATS as the Alien Tort Claims Act as less accurate).

<sup>2</sup> 28 U.S.C. § 1350.

<sup>3</sup> See *infra* Part II.

<sup>4</sup> *Sarei v. Rio Tinto PLC (Sarei I)*, 221 F. Supp. 2d 1116, 1160–63 (C.D. Cal. 2002), *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006), *aff’d in part, vacated in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>5</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], *available at* [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

<sup>6</sup> See *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 624–25 (E.D. Tex. 2006); *Sarei I*, 221 F. Supp. 2d at 1161–62.

<sup>7</sup> *Sarei I*, 221 F. Supp. 2d at 1208–09.

<sup>8</sup> *Id.* at 1208.

The Ninth Circuit delayed hearing the *Sarei* decision on appeal until the U.S. Supreme Court resolved an important ATS case, *Sosa v. Alvarez-Machain*.<sup>9</sup> The Court released its opinion in 2004 and held that federal courts should allow ATS suits based on principles of contemporary international law only if those norms have both wide acceptance and definite content comparable to those recognized as causes of action in the Judiciary Act of 1789, especially piracy, as is discussed in Section IV.<sup>10</sup> *Sosa* emphasized that courts had recognized only a small number of ATS causes of action in 1789 and stated that courts today should be cautious about recognizing ATS claims based on evolving norms of modern international law.<sup>11</sup>

In a 2006 decision, *Sarei v. Rio Tinto PLC*, a divided three-judge panel of the Ninth Circuit affirmed the district court's decision that UNCLOS constitutes customary international law that is cognizable under the ATS.<sup>12</sup> The Ninth Circuit assumed that UNCLOS met the *Sosa* decision's standard because the Convention has been widely adopted.<sup>13</sup> On April 12, 2007, however, in response to the defendant's petition for rehearing and for rehearing en banc, the three-judge panel withdrew its 2006 opinion and issued a superseding opinion and dissent.<sup>14</sup> The majority did not decide whether the plaintiffs' substantive claims were valid, but did conclude that the allegations were sufficiently serious to warrant the exercise of federal jurisdiction.<sup>15</sup> The Ninth Circuit reversed the district court's dismissal of all claims as nonjusticiable political questions and vacated the district court's dismissal of the UNCLOS claims on act of state and comity grounds, for reconsideration in light of its opinion.<sup>16</sup>

On August 20, 2007, the Ninth Circuit ordered that the case be reheard by the en banc court.<sup>17</sup> The order stated that "[t]he three judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."<sup>18</sup> The Ninth Circuit's decision to grant a rehearing by the en banc court may reflect its concern about an overly

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<sup>9</sup> 542 U.S. 692 (2004).

<sup>10</sup> *Id.* at 732.

<sup>11</sup> *Id.* at 732–33.

<sup>12</sup> *Sarei v. Rio Tinto PLC (Sarei II)*, 456 F.3d 1069, 1078 (9th Cir. 2006), *aff'd in part, vacated in part, rev'd in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007). Judge Bybee, in his dissenting opinion, argued that the plaintiffs must first exhaust any legal remedies available in Papua New Guinea; he did not address whether UNCLOS claims are cognizable under the ATS. *Sarei II*, 456 F.3d at 1100–01 (Bybee, J., dissenting).

<sup>13</sup> *Id.* at 1078 (majority opinion).

<sup>14</sup> *Sarei v. Rio Tinto PLC (Sarei III)*, 487 F.3d 1193, 1196–97 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007). Judge Bybee in his dissenting opinion again argued that the plaintiffs must first exhaust any legal remedies available in Papua New Guinea; he did not address whether UNCLOS claims are cognizable under the ATS. *Sarei III*, 487 F.3d at 1224–46 (Bybee, J., dissenting).

<sup>15</sup> *Sarei III*, 487 F.3d at 1203 (majority opinion).

<sup>16</sup> *Id.* at 1223–24.

<sup>17</sup> *Sarei v. Rio Tinto PLC (Sarei IV)*, 499 F.3d 923, 924 (9th Cir. 2007).

<sup>18</sup> *Id.*

broad interpretation by the three-judge panel opinion, although it is impossible to know until the circuit issues its opinion in the case. On rehearing en banc, the Ninth Circuit should hold that the UNCLOS claim is not cognizable under the ATS because the content of UNCLOS is not as definite as the norms recognized in 1789.

Even though plaintiffs may not cite the Ninth Circuit's withdrawn 2006 decision, in the future they will likely rely on its reasoning to try to convince courts to recognize UNCLOS and other environmental claims under the ATS. Because there are likely to be future cases involving UNCLOS and other environmental claims under the ATS, it is important to analyze whether the Ninth Circuit's reasoning in its withdrawn 2006 decision was convincing. On remand, the district court should hold that the UNCLOS claim is not cognizable under the ATS because the content of UNCLOS is not as definite as the norms recognized in 1789.

Although sympathetic to the goals of environmental plaintiffs, this Article argues that most international environmental law principles, including those in UNCLOS, are generally too vague to be the basis of an ATS suit under *Sosa's* definiteness standard. Neither the district court decision in *Sarei* nor the Ninth Circuit's withdrawn 2006 decision addressed whether UNCLOS has a definite content comparable to the causes of action recognized in 1789 and thus failed to meet the standard for ATS suits in *Sosa*. The *Sarei* decision's conclusion that UNCLOS codifies customary international law is reasonable because most countries have ratified the Convention and the United States recognizes a number of its provisions.<sup>19</sup> The fact that UNCLOS is widely accepted in the international community and constitutes customary international law is not enough to make the Convention cognizable under the ATS because the Convention's marine pollution provisions are vague in many respects and thus do not have a definite content comparable to 1789 causes of action. A weakness of both the district court decision in *Sarei* and the court of appeals' withdrawn 2006 decision is that neither opinion addressed UNCLOS's specific provisions. This Article examines UNCLOS's marine pollution provisions, especially its requirement that States avoid causing transboundary pollution. The Article discusses the one major transboundary pollution dispute brought before an UNCLOS arbitration panel. Because many of UNCLOS's terms are indefinite and there is little international case law about its marine pollution provisions, this Article concludes that international arbitration panels would be better suited to address a transboundary pollution claim than federal courts in an ATS suit.

Even under a broad interpretation of *Sosa*, most principles in international environmental agreements such as "sustainable development" are simply too vague to be enforceable.<sup>20</sup> Courts should generally reject ATS suits based on the general language or principles in MEAs because they do not possess a definite content comparable to those recognized in 1789 and thus fail to meet the *Sosa* standard.

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<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* notes 98, 272–275 and accompanying text.

International courts and arbitration procedures are better suited to addressing transboundary pollution issues than American courts.<sup>21</sup> Following *Sosa*, courts in ATS suits should usually recognize only serious human rights abuses such as torture as comparable to those recognized in 1789.<sup>22</sup> Like the *Sosa* court, this Article would leave the ATS door open to the possibility of an environmental suit, but only in rare cases where international environmental law is both widely adopted and very clear.

Part II will review the history of the ATS before the Supreme Court's seminal *Sosa* decision. Part III will review ATS decisions involving environmental claims before the *Sosa* decision. Part IV will explore the *Sosa* decision. Part V will discuss the district court decision in *Sarei* and the Ninth Circuit's 2006 and 2007 decisions. Part VI will demonstrate that customary international law requiring States to avoid harmful transboundary pollution is too vague to serve as the basis of an ATS suit. It will also show that UNCLOS's provisions are too vague to meet the *Sosa* standard for ATS suits.

## II. GENERAL PRINCIPLES: THE EVOLUTION OF ATS CASES FROM *FILARTIGA* TO *SOSA*

### A. History of the ATS

The first Congress enacted the ATS as part of the Judiciary Act of 1789.<sup>23</sup> The original language of the ATS gave the district courts "cognizance, concurrent with the court of the several States, or circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."<sup>24</sup> From 1789 until 1980, there were only two successful ATS suits, while more suits based upon the statute were rejected.<sup>25</sup>

As amended, the ATS currently provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>26</sup> The ATS explicitly authorizes a plaintiff to bring a claim under a treaty ratified by the United States, although ATS claims based on treaties have been rare.<sup>27</sup>

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<sup>21</sup> See *infra* notes 567–571 and accompanying text.

<sup>22</sup> See *infra* notes 211–213 and accompanying text.

<sup>23</sup> Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

<sup>24</sup> *Id.*

<sup>25</sup> See James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 110 & n.6 (2005) (noting that in the ATS precedent leading up to the Supreme Court's decision in *Filartiga v. Pena-Irala*, two cases successfully invoked the ATS jurisdiction while three cases unsuccessfully invoked ATS jurisdiction).

<sup>26</sup> 28 U.S.C. § 1350 (2006).

<sup>27</sup> See 28 U.S.C. § 1350; see also Boeving, *supra* note 25, 116–17 (stating that a tort cause of action that violates a United States treaty remains largely unexamined).

Additionally, the ATS provides for suits under the “law of nations.”<sup>28</sup>

*B. The Law of Nations: Filartiga v. Pena-Irala and Its Progeny*

In *Filartiga v. Pena-Irala*, a Paraguayan family brought an ATS suit against a former Paraguayan police chief for inflicting torture that resulted in the death of a family member.<sup>29</sup> In 1980, the Second Circuit held that the plaintiffs could sue the defendant under the ATS because torture by a state official violates the law of nations and therefore is actionable under the ATS.<sup>30</sup> In reaching this decision, the court determined that the ATS was not limited to rights recognized in 1789, and instead, found that “[it] is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>31</sup> Yet the *Filartiga* court also held that evolving norms of international law are enforceable under the ATS only if they command the “general assent of civilized nations.”<sup>32</sup> “This requirement,” according to the court, “is a stringent one.”<sup>33</sup> Finally, the court explained that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”<sup>34</sup>

Following *Filartiga*, most courts interpreted the ATS’s reference to the “law of nations” to require a plaintiff to prove that a defendant had violated a broadly recognized principle of customary international law.<sup>35</sup> Several decisions and commentators interpreted *Filartiga* to require that a plaintiff prove a violation of customary international law, which is defined as international norms that most States have adopted and recognized as mandatory legal obligations—*opinio juris*.<sup>36</sup>

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<sup>28</sup> 28 U.S.C. § 1350.

<sup>29</sup> 630 F.2d 876, 878 (2d Cir. 1980); see Boevig, *supra* note 25, at 110.

<sup>30</sup> *Filartiga*, 630 F.2d at 880 (“[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”). The court also found that the ATS simply authorizes suits in “the federal courts for adjudication of the rights already recognized by international law.” *Id.* at 887.

<sup>31</sup> *Id.* at 881.

<sup>32</sup> *Id.* (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

<sup>33</sup> *Id.* (quoting *Paquete*, 175 U.S. at 694).

<sup>34</sup> *Id.* at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

<sup>35</sup> See, e.g., *Flores v. S. Peru Copper Corp. (Flores II)*, 414 F.3d 233, 247–50 (2d Cir. 2003) (holding that ATS cause of action in tort includes violation of customary international law); *Beanal v. Freeport-McMoRan, Inc. (Beanal III)*, 197 F.3d 161, 165 (5th Cir. 1999) (stating that ATS cause of action in tort can stem from customary international law); Paul E. Hagen & Anthony L. Michaels, American Law Institution & American Bar Association Continuing Legal Education, *The Alien Tort Statute: A Primer on Liability for Multinational Corporations* (May 5–6, 2005), available at <http://www.westlaw.com> (type “SK046 ALI-ABA 121” into Citation field) (summarizing precedent that ATS cause of action in tort includes violation of customary international law).

<sup>36</sup> See, e.g., *Flores II*, 414 F.3d at 254 (holding that plaintiff must allege violation of a

Some courts have interpreted the “law of nations” requirement more narrowly than traditional definitions of customary international law to also require that a plaintiff demonstrate three factors: (1) that no State condones the act at issue and there is a “universal” norm against it, (2) that there are workable criteria to define whether a particular act constitutes a prohibited act that violates the norm, and (3) the prohibition against the act is consistently applied against every actor.<sup>37</sup> There has been controversy about each of these factors because scholars have disagreed about how many nations must adhere to a practice for it to be universal or consistent and what amount of evidence is required.<sup>38</sup> *Filartiga* and subsequent courts have also required evidence that the alleged violation is of “mutual, and not merely several, concern.”<sup>39</sup> Furthermore, some courts in addition consider whether the norm is recognized by the United States.<sup>40</sup>

A narrower subset of customary international law is the fundamental *jus cogens* norms that prohibit States from ever committing certain heinous human rights violations such as torture, slavery, or war crimes.<sup>41</sup> The Ninth Circuit in *Sarei* observed that *jus cogens* violations “form the least controversial core of

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rule derived from practices states consider legally obligatory); *see also* Boeving, *supra* note 25, at 116 & nn.41–42 (stating that violation is evidenced by state practice and *opinio juris*).

<sup>37</sup> *See Flores II*, 414 F.3d at 248 (“[I]n determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.”); *Beanal v. Freeport-McMoRan, Inc. (Beanal I)*, 969 F. Supp. 362, 370 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999); Boeving, *supra* note 25, at 116.

<sup>38</sup> Boeving, *supra* note 25, at 116 n.41; Hagen & Michaels, *supra* note 35, at 129–31.

<sup>39</sup> *See Flores II*, 414 F.3d at 244; *Beanal III*, 197 F.3d at 167; *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Filartiga*, 630 F.2d at 888; Boeving, *supra* note 25, at 116 n.45.

<sup>40</sup> *See, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992); *Sarei I*, 221 F. Supp. 2d 1116, 1132 (C.D. Cal. 2002), *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006), *aff’d in part, vacated in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007); *Nat’l Coal. Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D. Cal. 1997); Boeving, *supra* note 25, at 123.

<sup>41</sup> A *jus cogens* norm “is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332; *see Hirsh v. Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997) (“A foreign state violates *jus cogens* when it participates in such blatant violations of fundamental human rights as ‘genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.’” (quoting *Comm. of U.S. Citizens in Nicar. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988))); *Denegri v. Chile*, Civ. A. No. 86–3085, 1992 WL 91914, at \*4 n.7 (D.D.C. Apr. 6, 1992) (“[*Jus cogens* comprises the ‘fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.’”); Joshua Gregory Holt, Comment, *The International Law Exception to the Act of State Doctrine: Redressing Human Rights Abuses in Papua New Guinea*, 16 PAC. RIM L. & POL’Y J. 459, 469 n.61 (2007).



modern day ATCA jurisdiction.”<sup>42</sup> Some courts and scholars have argued that courts should limit ATS cases to only jus cogens norms.<sup>43</sup> Other courts and commentators have argued that the ATS’s jurisdiction includes customary international law norms that are not jus cogens norms.<sup>44</sup> As will be discussed below, the Supreme Court in *Sosa* did not clearly limit ATS claims to jus cogens norms, but may have allowed a somewhat broader range of customary international law claims.<sup>45</sup>

Before the U.S. Supreme Court’s *Sosa* decision, the most controversial issue surrounding *Filartiga* was the extent to which American courts should recognize new rights and duties that have developed in international law since 1789.<sup>46</sup> Most courts followed *Filartiga* in allowing ATS claims based on contemporary customary international law, although there was some disagreement among courts regarding which current norms are sufficiently obligatory and universally recognized to be cognizable under the ATS.<sup>47</sup> By contrast, rejecting *Filartiga*’s evolutionary approach to international law, Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic* argued an “originalist” approach that claims under the ATS are limited to those torts that violated the “law of nations” when

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<sup>42</sup> *Sarei III*, 487 F.3d 1193, 1202 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>43</sup> See, e.g., *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) (arguing that only jus cogens norms are actionable), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (holding that jus cogens norms are the standard); David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 Wash. & Lee L. Rev. 1219, 1223, 1245–49, 1268–70 (2005) (stating that jus cogens should be minimum threshold for ATS actionable norms); Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT’L ECON. L. 193, 265–66 (2005) (asserting that jus cogens is best way to provide remedy for human rights violations).

<sup>44</sup> See *Sarei II*, 456 F.3d at 1085–86 (allowing UNCLOS to serve as ATS claim even though it is not clearly a jus cogens violation); *Sideman de Blake v. Argentina*, 965 F. 2d 699, 715 (9th Cir. 1992) (stating that ATS claims may be based on customary international law norm that is not jus cogens violation); see also William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT’L & COMP. L. REV. 351, 357–58 (2001) (same); Hugh King, *Sosa v. Alvarez-Machain and the Alien Tort Claims Act*, 37 VICT. U. WELLINGTON L. REV. 1, 9 (2006) (same); Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT’L L.J. 245, 265–72 (2004) (same).

<sup>45</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); Holt, *supra* note 41, at 469–70.

<sup>46</sup> See Boeving, *supra* note 25, at 110–11.

<sup>47</sup> See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (expanding ATS to allow claims against private individuals); Jason W. Brant, Case Note, *Flores v. Southern Peru Copper Corporation: The Second Circuit Closes the Courthouse Door on Environmental Claims Brought Under the ATCA*, 35 U. MIAMI INTER-AM. L. REV. 131, 134 (2003) (arguing that *Filartiga* rejects the notion that international law was frozen in 1789).

Congress enacted the legislation in 1789.<sup>48</sup> At that time in history, the ATS would have reached only claims of piracy and prize claims involving seizures of ships, offenses against ambassadors, and violations of safe conduct.<sup>49</sup>

### C. United States Treaties

In addition to actions based on the law of nations, the ATS also clearly recognizes actions based on an alleged tort that violates “a treaty of the United States.”<sup>50</sup> Because a number of ATS plaintiffs like those in *Sarei* have used treaties as evidence of the law of nations, ATS suits that are based on a violation of a “treaty of the United States” must be distinguished from those alleging a violation of the law of nations based in part on evidence from treaties to which the United States may or may not be a party. To qualify as a “treaty of the United States,” the United States would have to be a party to the relevant treaty and it would have to be in force in the United States.<sup>51</sup>

Although treaties of the United States are defined in the Supremacy Clause of the Constitution as part of the “supreme Law of the Land” along with statutes and the Constitution itself,<sup>52</sup> treaties do not generally create rights that are privately enforceable in courts.<sup>53</sup> Pursuant to the arising under clause 28 U.S.C. § 1331, federal courts have jurisdiction over suits based on treaties only if the treaty is self-executing, meaning treaties that expressly or impliedly create a private cause or action.<sup>54</sup> If a treaty is not self-executing, a plaintiff may enforce its provisions only

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<sup>48</sup> 726 F.2d 774, 798–827 (D.C. Cir. 1984) (Bork, J., concurring).

<sup>49</sup> Boevig, *supra* note 25, at 111 n.14

<sup>50</sup> See 28 U.S.C. § 1350 (2006); Boevig, *supra* note 25, at 116–17.

<sup>51</sup> See Boevig, *supra* note 25, at 117.

<sup>52</sup> The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

<sup>53</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89–90, 98 (1833); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (holding that a treaty might not “operate of itself”), *overruled on other grounds by Percheman*, 32 U.S. (7 Pet.) at 51; *Frolova v. U.S.S.R.*, 761 F.2d 370, 373 (7th Cir. 1985) (per curiam) (commenting that usually treaties “do not provide the basis for a private lawsuit unless they are intended to be self-executing”); *Tel-Oren*, 726 F.2d at 808 (D.C. Cir. 1984) (Bork, J., concurring) (stating that treaties on their own force actually deny cause of action); *Dreyfus v. Von Finck*, 534 F.2d 24, 29–30 (2d Cir. 1976) (stating that only limited treaties may be relied upon).

<sup>54</sup> See *Head Money Cases*, 112 U.S. 580, 598–99 (1884); *Frolova*, 761 F.2d at 373; *Tel-Oren*, 726 F.2d at 808 (Bork, J., concurring); *Dreyfus*, 534 F.2d at 30 (“It is only when

when Congress has enacted legislation that specifically creates a private right of action.<sup>55</sup>

Whether a treaty or international agreement constitutes domestic United States law and is thus enforceable by courts depends on whether it is self-executing.<sup>56</sup> To determine whether a treaty or executive agreement is self-executing, courts first examine the language of the agreement. If the language is uncertain, courts then also examine the circumstances concerning its negotiation, the type of obligations that it imposes, and how those obligations would be enforced.<sup>57</sup> An agreement is self-executing if the parties to an agreement, including the United States, intended that the agreement have binding effect as domestic law without Congress or the legislative bodies in other party countries implementing additional legislation.<sup>58</sup> Similarly, the 1987 Restatement (Third) of Foreign Relations Law of the United States (Restatement (Third)) states that an international agreement is non-self-executing “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or if implementing legislation is constitutionally required.”<sup>59</sup>

Unfortunately, it is not always clear from a treaty’s language or legislative

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a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights.”); Boevig, *supra* note 25, at 117. *But see* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545, 553 n.44 (2000) (acknowledging that most scholars believe that ATS suits can be based on self-executing treaties only, but arguing in favor of ATS suits based on non-self-executing treaties because otherwise the treaty provision in the ATS is superfluous because plaintiffs can already sue to enforce self-executing treaties under 28 U.S.C. § 1331 “arising under” jurisdiction).

<sup>55</sup> See *Jama v. United States I.N.S.*, 22 F. Supp. 2d 353, 362 (D.N.J. 1998).

<sup>56</sup> Virginia A. Melvin, Case Comment, *Tel-Oren v. Libyan Arab Republic: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211, 219 n.42 (1985) (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 141, 147, 154 (1965)).

<sup>57</sup> *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (“In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution.”); *Saipan ex rel. Guerrero v. U.S. Dep’t of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (finding that whether an international agreement “establishes affirmative and judicially enforceable obligations without implementing legislation” depends on “the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution”); Melvin, *supra* note 56, at 219 n.42.

<sup>58</sup> Melvin, *supra* note 56, at 219 n.42.

<sup>59</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (4)(a)–(c) (1987).

history whether it is self-executing or not.<sup>60</sup> The United States has often attached reservations, understandings, and declarations to a treaty that seek to limit its domestic effect by including a declaration that it is not self-executing.<sup>61</sup> In other cases, Congress has declared that a treaty is not self-executing and creates no rights in federal courts.<sup>62</sup>

#### *D. Private Versus State Actors*

Many treaties apply only to the state parties that signed them and do not apply to private actors.<sup>63</sup> Some ATS plaintiffs have argued that treaties that apply only to state parties such as UNCLOS can be used as evidence of what is customary international law and thus can apply indirectly to private defendants.<sup>64</sup> Additionally, there are some treaties that are applicable to individuals, including the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), which limits the discharge of certain pollutants from ships.<sup>65</sup>

Customary international law clearly reaches the activities of state officials. The *Filartiga* decision, for example, involved the conduct of a former state official who committed alleged violations of international law while he was employed by

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<sup>60</sup> Compare *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (holding the English version of an 1819 treaty with Spain to be non-self-executing), with *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833) (holding the Spanish version of the same treaty to be self-executing); *Guerrero*, 502 F.2d at 97 (discussing “contextual” factors affecting whether treaty is self-executing); Melvin, *supra* note 56, at 219 n.42; Andrew M. Scoble, Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127, 160 n.194 (1986).

<sup>61</sup> Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT’L L. & POL’Y 807, 823–24 (1998) (“As an example, the United States attached to its ratification of the International Covenant on Civil and Political Rights ‘the cornerstone of modern international human rights law’ five reservations, five understandings, and four declarations.” (footnotes omitted)).

<sup>62</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”).

<sup>63</sup> See *Flores II*, 414 F.3d 233, 258–59 (2d Cir. 2003); Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 403 (2002); Boevig, *supra* note 25, at 137; Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 191, 192 (2001).

<sup>64</sup> See *infra* notes 67–72 and accompanying text.

<sup>65</sup> See International Convention for the Prevention of Pollution from Ships, art. 1(b), Nov. 2, 1973, 94 Stat. 2302, 1340 U.N.T.S. 61, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 16, 1978, 1340 U.N.T.S. 3 [hereinafter MARPOL 73/78]; DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW & POLICY 791–814 (3d ed. 2007); Boevig, *supra* note 25, at 137.

the State.<sup>66</sup> There has been controversy, however, about whether and under what circumstances private individuals or corporations may be liable under the ATS.<sup>67</sup> In 1984, Judge Edwards in a solo concurring opinion in *Tel-Oren* argued that there were only a “handful of crimes to which the law of nations attributes individual responsibility,” including the long prohibited practices of piracy and slave trading.<sup>68</sup> He argued that there was insufficient consensus at that time that torture by private actors violated international law.<sup>69</sup>

By contrast, in *Kadic v. Karadzic*, the Second Circuit held that international law prohibited non-state, private individuals from committing a broader range of crimes and hence that those individuals were subject to ATS jurisdiction.<sup>70</sup> The court argued that the ATS should apply to serious violations by private actors:

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.<sup>71</sup>

The Second Circuit concluded that private individuals could be liable under the ATS for the crimes of piracy, slave trading, genocide, and war crimes.<sup>72</sup> On the other hand, the court determined that “torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law.”<sup>73</sup>

If international law prohibits private individuals from committing certain acts, international law generally applies the same prohibitions to corporations.<sup>74</sup> In

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<sup>66</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (“We find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”).

<sup>67</sup> Hagen & Michaels, *supra* note 35, at 130–31.

<sup>68</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring).

<sup>69</sup> *Id.* at 791–795. Judge Edwards was the only member of the *Tel-Oren* panel to address whether the law of nations applies to non-state actors. *Kadic v. Karadzic*, 70 F.3d 232, 240 n.5 (2d Cir. 1995). Judge Bork, based on separation of powers principles and the original 1789 intent of the statute, concluded that the Alien Tort Statute does not apply to modern violations of the law of nations. *Tel-Oren*, 726 F.2d at 798 (Bork, J., concurring). Judge Robb concluded that the issue in the case was nonjusticiable. *Id.* at 823 (Robb, J., concurring).

<sup>70</sup> *See Kadic*, 70 F.3d at 239.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 239–43.

<sup>73</sup> *Id.* at 243.

<sup>74</sup> *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (human rights abuses); *Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (human rights abuses); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (wrongful death); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d

*Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the district court determined that “a considerable body of United States and international precedent indicates that corporations may be liable for violations of international law.”<sup>75</sup> In *Sosa*, the Supreme Court in a footnote stated that the issue was whether “private actors,” either corporations or private individuals, were liable under the ATS and did not differentiate between private individuals and corporations.<sup>76</sup>

Another issue is when private individuals or corporations may be vicariously liable for conduct that is allegedly undertaken “under the color of state authority” of a foreign nation or that allegedly “aids and abets” human rights violations committed by foreign governments or paramilitary groups.<sup>77</sup> To answer this question, federal courts have analogized the domestic color of law jurisprudence of 42 U.S.C. § 1983 to assess whether a private defendant is a state actor for purposes of jurisdiction under the ATS.<sup>78</sup> In *Kadic*, for example, the Second Circuit concluded that international law recognized that private actors acting in close concert or cooperation with a State are held to be acting as a State and therefore subject to the same standards of conduct as a State.<sup>79</sup> In *Doe I v. Unocal Corp.*, the District Court for Central California concluded that “private actors can be state actors if they are ‘willful participant[s] in joint action with the state or its agents.’”<sup>80</sup> Additionally, the *Unocal* court determined that an agreement between a government and a private party can constitute joint action.<sup>81</sup> The court held that a complaint alleging that a corporation was “jointly engaged with the state officials in the challenged activity, namely forced labor and other human rights violations in furtherance of the pipeline project” was sufficient to plead state action.<sup>82</sup> Finally, the Ninth Circuit in *Sarei III* concluded that claims of vicarious liability are still viable after *Sosa* because courts applying the ATS “draw on federal common law, and there are well-settled theories of vicarious liability under federal common

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289, 308 (S.D.N.Y. 2003) (torture); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (human rights abuses and torture). Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 557–58 (2005).

<sup>75</sup> 244 F. Supp. 2d at 308.

<sup>76</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

<sup>77</sup> Hagen & Michaels, *supra* note 35, at 130–31; Stephens, *supra* note 74, at 558–60.

<sup>78</sup> See, e.g., *Sarei I*, 221 F. Supp. 2d 1116, 1160–63 (C.D. Cal. 2002), *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006), *aff’d in part, vacated in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007); *Kadic*, 70 F.3d at 245; Christensen, *supra* note 43, at 1255–56 (discussing use of § 1983 “color of law” jurisprudence in ATS suits).

<sup>79</sup> *Kadic*, 70 F.3d at 245 (“A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”).

<sup>80</sup> 963 F. Supp. 880, 890 (C.D. Cal. 1997) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 891.

law.”<sup>83</sup>

The Supreme Court and lower courts have distilled decisions such as *Kadic* and *Unocal* to four different tests to determine if a private party is acting in such close concert with a sovereign government to be considered a “state actor”: (1) the public function test;<sup>84</sup> (2) the symbiotic relationship test;<sup>85</sup> (3) the nexus test;<sup>86</sup> and (4) the joint action test.<sup>87</sup> In *Beanal v. Freeport-McMoRan, Inc. (Beanal I)*, the Federal District Court for Eastern Louisiana stated that only one of the four tests needs be met to treat a private party as a state actor for purposes of an ATS suit.<sup>88</sup>

### E. Defenses

When an ATS claim is based on wholly foreign acts by non-U.S. citizens, the defendant must have sufficient contacts with the United States to establish personal jurisdiction under the “minimum contacts” test.<sup>89</sup> Furthermore, courts have often dismissed these cases on four separate grounds: (1) the *forum non conveniens* (FNC) doctrine, (2) the political question doctrine, (3) the act of state doctrine, and (4) the international comity doctrine.<sup>90</sup>

In cases involving wholly foreign actions by non-U.S. citizens, defendants usually seek to dismiss the case based on the FNC doctrine, which requires U.S. courts to assess whether a foreign court would be an adequate forum to resolve the case. Pursuant to the FNC doctrine, courts have the discretion to decline jurisdiction when the convenience of the parties and the goals of justice would be

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<sup>83</sup> *Sarei III*, 487 F.3d 1193, 1202 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>84</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (applying public function test when a private actor performs a function that is “traditionally the exclusive prerogative of the State”); Christensen, *supra* note 43, at 1254 n.210.

<sup>85</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (using symbiotic relationship test when the state “has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity”); Christensen, *supra* note 43, at 1254 n.211.

<sup>86</sup> HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *CIVIL RIGHTS LAW AND PRACTICE* 78 (2d ed. 2004) (stating nexus test “requires evidence that the state has coerced or significantly encouraged the private party to engage in [the relevant] conduct”); Christensen, *supra* note 43, at 1254 n.212.

<sup>87</sup> *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (stating joint action test applies when “[a private individual] acts together with state officials or with significant state aid”); Christensen, *supra* note 43, at 1254–55 & n.213.

<sup>88</sup> 969 F. Supp. 362, 376–79 (E.D. La. 1997), *aff’d on other grounds*, 197 F.3d 161 (5th Cir. 1999); RoseMary Reed, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM L. & POL’Y J. 399, 407 (2002).

<sup>89</sup> Hagen & Michaels, *supra* note 35, at 131.

<sup>90</sup> See Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 768–74 (2004).

better served in another forum.<sup>91</sup> A court must consider both the public interest—including the State's interest, burdens on the court, and conflict of law considerations—and the private interest—including the convenience of the parties and access to evidence, but may consider differences in substantive law only if litigation in another forum would defeat the ends of justice.<sup>92</sup>

Additionally, defendants may seek dismissal based on the political question doctrine, the act of state doctrine, or international comity doctrines. As is discussed in Part V, the district court and the Ninth Circuit in *Sarei* extensively discuss these three doctrines. Under the political question doctrine, a court considers whether it is appropriate for the judiciary to accept a case that may interfere with the constitutional or policy prerogatives of the legislative or executive branches, including their foreign policy authority.<sup>93</sup> The act of state doctrine prohibits an American court from adjudicating claims if doing so would require the court to invalidate the official acts of a foreign sovereign performed within its territory; however, the doctrine is inapplicable if government has committed a jus cogens violation or violates a treaty obligation, and perhaps also if there are other clear violations of customary international law.<sup>94</sup> The international comity doctrine is a

<sup>91</sup> Boevig, *supra* note 25, at 120 n.68.

<sup>92</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6, 247 (1981); Boevig, *supra* note 25, at 120 n.68; Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self After Wiwa*, 16 EMORY INT'L L. REV. 187, 206 (2002).

<sup>93</sup> In *Baker v. Carr*, the Supreme Court provided six factors to consider in deciding whether the political question doctrine applied:

Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] or an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217(1962); see Jodie Michalski, *The Careless Gatekeeper: Sarei v. Rio Tinto, PLC, and the Expanding Role of U.S. Courts in Enforcing International Norms*, 15 TUL. J. INT'L & COMP. L. 731, 741–42 (2007) (discussing political question doctrine).

<sup>94</sup> See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (holding that the act of state doctrine generally bars courts from questioning a foreign sovereigns' official acts done within its own territory); *Sarei I*, 221 F. Supp. 2d 1116, 1183 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *aff'd in part, vacated in part, rev'd in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007); Boevig, *supra* note 25, at 125 n.116 (discussing act of state doctrine); Holt, *supra* note 41, at 470–91 (arguing act of state doctrine is inapplicable if foreign nation violates "crystallized international rules of law" or



discretionary doctrine under which courts consider whether it is appropriate for an American court to litigate issues that are of great concern to a foreign government.<sup>95</sup>

### III. ENVIRONMENTAL CLAIMS UNDER THE ATS BEFORE *SOSA*

Since 1991, district courts and courts of appeals have addressed a number of environmental or related claims under the ATS. Most of these suits asserted directly or indirectly that developing nations are unable to protect particular ethnic groups in their country from the environmental harms of multinational companies (MNCs) because the national government is either too weak to regulate the MNC or is acting in concert with the MNC.<sup>96</sup> The environmental ATS suits seek American courts to provide justice that is allegedly unavailable from the developing country's courts.

Some claims in the cases discussed below were for purely environmental claims such as harm to land, air, or water. Purely environmental ATS claims have sometimes encountered difficulties because of questions about whether there are universally recognized norms against such pollution. For example, some courts have questioned whether internal environmental harms in one nation can violate international law, which is primarily concerned with transboundary harms affecting other nations.<sup>97</sup> Courts have rejected environmental claims based on vague principles in MEAs such as "sustainable development" because it is not clear how much pollution or environmental degradation would be sufficient to violate such principles.<sup>98</sup>

Because of the difficulties in winning ATS claims based on environmental harms alone, a number of cases have alleged that environmental harms constitute human rights violations or are intertwined with traditional human rights violations such as torture.<sup>99</sup> Courts have generally rejected environmental ATS claims based

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a treaty obligation); Michalski, *supra* note 93, at 740–41 (discussing act of state doctrine).

<sup>95</sup> The Supreme Court in *Hilton v. Guyot* explained the international comity doctrine as follows:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

59 U.S. 113, 163–64 (1895).

<sup>96</sup> See Abadie, *supra* note 90, at 745–46; Boeving, *supra* note 25, at 112–15; Richard L. Herz, *Making Development Accountable to Human Rights and Environmental Protection*, 94 AM. SOC'Y OF INT'L LAW PROC. 216, 217 (2000).

<sup>97</sup> See *infra* notes 102–109, 431–439 and accompanying text.

<sup>98</sup> See *infra* notes 150–159 and accompanying text.

<sup>99</sup> See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 814 (5th Cir. 2004);

on broad assertions that there is a fundamental international human right to life or to live in a clean and healthy environment because there are no real limits or boundaries to such assertions.<sup>100</sup> Courts are more likely to accept ATS claims based on allegations that MNCs or foreign governments engaged in human rights abuses such as using torture to take land from disfavored ethnic groups to appropriate natural resources, but those types of claims at bottom are human rights cases and not environmental cases even if environmental exploitation was a motivating factor leading to the human rights abuses.<sup>101</sup> Although plaintiffs have never won an environmental challenge under the ATS, some decisions suggest that environmental ATS claims can be successful if the plaintiffs assert narrow and well-recognized international law principles.

#### A. *Amlon Metals, Inc. v. FMC Corp.*

In *Amlon Metals, Inc. v. FMC Corp.*, a court for the first time directly addressed an environmental claim under the ATS.<sup>102</sup> The plaintiffs sued FMC under the ATS for fraudulently transporting hazardous materials that contained far more toxicity than the nonhazardous material promised in the contract between the plaintiffs and the defendant.<sup>103</sup> The plaintiffs argued that the fraudulent sale violated the Restatement (Third) and Principle 21 of the 1972 Stockholm Declaration of Principles, which grants States the “sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”<sup>104</sup>

The District Court for the Southern District of New York held that the environmental claims were insufficient to establish a violation of international

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*Bano v. Union Carbide Corp.*, 361 F.3d 696, 702–03 (2d Cir. 2004); *Doe v. Unocal Corp.*, 248 F.3d 915, 920 (9th Cir. 2001); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004); Carl Bruch, *Is International Environmental Law Really “Law”? An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 447–48 n.111 (2006).

<sup>100</sup> See *infra* notes 150–159, 433 and accompanying text.

<sup>101</sup> Boevig, *supra* note 25, at 117 n.51–52, 129–30, 134–40; Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003).

<sup>102</sup> 775 F. Supp. 668 (S.D.N.Y. 1991).

<sup>103</sup> *Id.* at 669–70. The plaintiffs also sued under the Resource Recovery and Conservation Act (RCRA), but that topic is beyond the scope of this Article. *Id.* at 672–76.

<sup>104</sup> *Id.* at 671 (citing United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 21, U.N. Doc. A/CONF.48/14/Rev. 1, reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 602(2) (1987); Boevig, *supra* note 25, at 118–19.

law.<sup>105</sup> The court found that Principle 21 in the Stockholm Declaration did not “set forth any specific proscriptions, but rather refer[red] only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders.”<sup>106</sup> The court determined that the Restatement possibly reflected American views on environmental law, but not “universally recognized principles of international law.”<sup>107</sup> Accordingly, under *Filartiga*, the court concluded that the plaintiff failed to demonstrate that prohibiting fraudulent shipments of hazardous materials was universally recognized in international law.<sup>108</sup> The court granted the defendant’s Rule 12(b)(1) motion to dismiss because the complaint failed to allege a “clear . . . violation of the law of nations.”<sup>109</sup> Following *Amlon Metals*, most cases followed the district court’s conclusion that general principles in a multinational environmental treaty or declaration such as the Stockholm Declaration are insufficient to state a cause of action under the ATS.

*B. Beanal v. Freeport-McMoRan, Inc.*

*1. The District Court’s Decision*

In *Beanal v. Freeport-McMoRan, Inc. (Beanal I)*, the plaintiff sued Freeport under the ATS for torture, cultural genocide of his Amungme tribe, and environmental torts allegedly resulting from the defendant’s mining activities in Tamika, Irian Jaya (within the Republic of Indonesia).<sup>110</sup> The environmental claims alleged that the defendant’s mining practices caused “destruction, pollution, alteration, and contamination of natural waterways, as well as surface and ground water sources; deforestation; destruction and alteration of physical surroundings.”<sup>111</sup> The district court dismissed the environmental claim for failing to state a claim for an environmental tort in violation of the law of nations because the plaintiff failed to articulate how the defendant’s alleged pollution violated international law.<sup>112</sup> The plaintiff had argued that the “allegations support[ed] a cause of action based on three international environmental law principles: (1) the Polluter Pays Principle; (2) the Precautionary Principle; and (3) the Proximity Principle.”<sup>113</sup> Relying on an international environmental law treatise, the court concluded that “[t]he three principles relied on by Plaintiff, standing alone, do not constitute international torts for which there is universal consensus in the

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<sup>105</sup> *Amlon Metals*, 775 F. Supp. at 671.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; see Reed, *supra* note 88, at 408.

<sup>109</sup> *Amlon Metals*, 775 F. Supp. at 671.

<sup>110</sup> 969 F. Supp. 362, 366, 369 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999); Boeving, *supra* note 25, at 120–22; Reed, *supra* note 88, at 409.

<sup>111</sup> *Beanal I*, 969 F. Supp. at 369.

<sup>112</sup> *Id.* at 382–84.

<sup>113</sup> *Id.* at 383.

international community as to their binding status and their content.”<sup>114</sup> Additionally, the court questioned the appropriateness of using these three principles against the defendant because they apply only to States and not to corporations such as the defendant.<sup>115</sup> Thus, because the plaintiff had alleged that the defendant’s actions were “corporate decisions, rather than state practices,” the plaintiff’s allegations failed to establish a claim under either international customary law or the Restatement, which both focus solely on “state obligations and liability in the area of environmental law.”<sup>116</sup>

Additionally, the court suggested that extreme environmental injuries might constitute genocide if the defendant specifically intended to cause such destruction. In this case, however, the court concluded that the plaintiff’s vague allegations that the environmental harms constituted “cultural genocide” were insufficient to establish a violation of international law because the plaintiff failed to allege that the defendant caused the pollution with the purpose of destroying the Amungme group.<sup>117</sup> Despite the court’s dismissal of the environmental claims, some commentators have interpreted the district court’s initial decision to “suggest that claims for environmental human rights violations” might be filed under the ATS “if pled with sufficient specificity.”<sup>118</sup>

The court dismissed the First Amended Complaint without prejudice, but allowed the plaintiff to file a Second Amended Complaint that more specifically plead his allegations of genocide and human rights violations.<sup>119</sup> After the plaintiff filed a Second Amended Complaint, the district court granted the defendant’s motion to strike that complaint and dismissed the complaint because the plaintiff had again failed to plead his allegations with sufficient specificity on the issues of genocide and state action.<sup>120</sup> The court rejected the plaintiff’s attempt to clarify his environmental allegations and stated that it had “not invit[ed] more definite allegations as to other issues, including . . . environmental torts.”<sup>121</sup> Finally, “the district court granted Freeport’s motion to strike Beanal’s Third Amended Complaint and dismissed his claims with prejudice.”<sup>122</sup>

## 2. *The Court of Appeals’ Decision*

On appeal, the Fifth Circuit affirmed the district court’s decision to dismiss the complaint with prejudice.<sup>123</sup> In explaining its position, the Fifth Circuit

<sup>114</sup> *Id.* at 384 (citing *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 372–73.

<sup>118</sup> Reed, *supra* note 88, at 409.

<sup>119</sup> *Beanal I*, 969 F. Supp. at 384.

<sup>120</sup> *Beanal v. Freeport-McMoRan, Inc. (Beanal II)*, 1997 U.S. Dist. LEXIS 12001, at \*3–4 (E.D. La. Aug. 6 1997).

<sup>121</sup> *Id.* at \*4.

<sup>122</sup> *Beanal III*, 197 F.3d 161, 163–64 (5th Cir. 1999).

<sup>123</sup> *Id.* at 163–69.

appeared to be skeptical of environmental claims under the ATS. The court observed that the “sources of international law cited by Beanal and the *amici* merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.”<sup>124</sup> The court also stated that “federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments. . . . [e]specially when the alleged environmental torts and abuses occur within the sovereign’s borders and do not affect neighboring countries.”<sup>125</sup>

Specifically, the Fifth Circuit noted that the plaintiff cited the Rio Declaration to support his claims of environmental torts and abuses under international law, but concluded that Principle 2 of the Declaration was inconsistent with the plaintiff’s internal pollution claims because it recognized that States have the “sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.”<sup>126</sup> The court suggested that allegations of transboundary pollution potentially violating the Rio Declaration might be actionable under the ATS, but observed that “Beanal does not allege in his pleadings that Freeport’s mining activities in Indonesia have affected environmental conditions in other countries.”<sup>127</sup> The tone of the Fifth Circuit’s opinion was arguably less receptive to future environmental claims under the ATS than the district court’s decision, but even the Fifth Circuit did not close the door to transboundary pollution claims.

### C. *Jota v. Texaco, Inc. and Aguinda v. Texaco, Inc.*

#### 1. *The District Court’s Decisions*

In *Aguinda v. Texaco, Inc. (Aguinda I)*, the plaintiffs sued a multinational oil corporation, Texaco, for significant environmental harms.<sup>128</sup> The plaintiffs alleged that the defendant had intentionally released hazardous wastes into the environment, damaged pristine rainforests, and harmed indigenous peoples living in the rain forest and their properties.<sup>129</sup> The plaintiffs sought to certify a class of over 30,000 Ecuadorians whose environment was damaged by the oil company’s

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<sup>124</sup> *Id.* at 167.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 167 n.6 (quoting United Nations Conference on Environmental and Development, Rio de Janeiro, Brazil, June 3–14, 1992, princ. 2, *Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 [hereinafter Rio Declaration]).

<sup>127</sup> *Beanal III*, at 167 n.6; see Abadie, *supra* note 90, at 787.

<sup>128</sup> No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 4718, at \*1–2 (S.D.N.Y. Apr. 11, 1994), reconsidered by 850 F. Supp. 282 (S.D.N.Y. 1994).

<sup>129</sup> *Id.* at \*1–2.

practices in Ecuador.<sup>130</sup>

In a preliminary decision in 1994, the U.S. District Court for the Southern District of New York in an opinion by Judge Broderick adopted a broad view of States' responsibility for preventing environmental damage.

Although many authorities are relevant, perhaps the most pertinent in the present case is the Rio Declaration on Environment and Development (1992). Principle 2 on the first page of the document recognizes that States have "the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies," but also have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction."<sup>131</sup>

Judge Broderick suggested that Principle 2 may constitute customary international law when he stated, "[t]he Rio Declaration may be declaratory of what it treated as pre-existing principles just as was the Declaration of Independence."<sup>132</sup>

To support their claim that the defendant violated Principle 2, the plaintiffs suggested that the alleged pollution impacted the rainforest in the region, in addition to their primary claims of damage by the defendant within Ecuador.<sup>133</sup> In response to this suggestion, Judge Broderick observed that the "[p]laintiffs may or may not be able to establish international recognition of the worldwide impact from effects on tropical rain forests as a result of any conduct alleged in their papers which may have been initiated in the United States."<sup>134</sup> Judge Broderick's willingness to consider the broad principles against transboundary pollution in Principle 2 of the Rio Declaration as potentially binding customary international law is at odds with the *Amlon Metals* decision's conclusion that identical language in Principle 21 of the Stockholm Declaration was too vague to be enforceable under the ATS.<sup>135</sup>

Acknowledging that the United States adhered to international commitments to control hazardous wastes, Judge Broderick suggested that the plaintiff should be permitted to challenge the defendant's actions with a claim under the ATS so long as "there were established misuse of hazardous waste of sufficient magnitude to amount to a violation of international law."<sup>136</sup> Citing *Amlon Metals*, he cautioned, however, that "[n]ot all conduct which may be harmful to the environment, and not

<sup>130</sup> *Id.* at \*2.

<sup>131</sup> *Id.* at \*22 (quoting Rio Declaration, *supra* note 126, princ. 2).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at \*1–2.

<sup>134</sup> *Id.* at \*22–23.

<sup>135</sup> Compare *id.* at \*22–23 (suggesting that Principle 2 in Rio Declaration may create customary international law prohibition against transboundary pollution), with *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991); see *supra* Part III.A.

<sup>136</sup> *Aguinda I*, 1994 U.S. Dist. LEXIS 4718, at \*24.

all violations of environmental laws, constitute violations of the law of nations.”<sup>137</sup> He also had reservations about interfering with the decisions of other nations.<sup>138</sup> Responding to motions by Texaco and the Ecuadorian government to dismiss the case because it should be resolved in Ecuador’s courts, Judge Broderick delayed deciding the case on the merits and instead sought to determine if Ecuador’s courts would accept the case.<sup>139</sup> Judge Broderick died before he had an opportunity to decide the case.

After Judge Broderick’s death, the District Court in *Aguinda II*, in a decision by Judge Rakoff, dismissed the *Aguinda* action on three separate grounds: (1) the FNC doctrine; (2) the international comity doctrine; and (3) the plaintiffs’ failure to join two indispensable parties—the Republic of Ecuador and its state-owned oil company, Petroecuador, which were exempt from suit under the Foreign Sovereign Immunities Act.<sup>140</sup> In light of these three grounds, Judge Rakoff concluded that Ecuador’s courts were a more appropriate forum for deciding a case in which almost all the alleged harms took place in Ecuador.<sup>141</sup> In dismissing the case, Judge Rakoff asserted in dicta that “[i]n short, plaintiffs’ imaginative view of this Court’s power must face the reality that United States district courts are courts of limited jurisdiction. While their power within those limits is substantial, it does not include a general writ to right the world’s wrongs.”<sup>142</sup>

## 2. The Court of Appeals’ Decision and Remand

After consolidating *Aguinda* with another case, the Second Circuit in *Jota v. Texaco* reversed and remanded the dismissal in *Aguinda* because Judge Rakoff had erred in granting the dismissals absent an agreement by appellee Texaco to submit to the jurisdiction of the courts in Ecuador.<sup>143</sup> After defendant Texaco agreed to accept Ecuador’s jurisdiction, on remand, the district court in *Aguinda III* granted defendant Texaco’s motion to dismiss on the grounds of the FNC doctrine because “these cases have everything to do with Ecuador and nothing to do with the United States.”<sup>144</sup> Citing the Fifth Circuit’s decision in *Beanal III* and the *Amlon Metals*

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*24–25.

<sup>139</sup> *Id.* at \*10, 28–32.

<sup>140</sup> *Aguinda v. Texaco, Inc. (Aguinda II)*, 945 F. Supp. 625, 627–28 (S.D.N.Y. 1996) (citing Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603(b), 1604 (2006)), *vacated by Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), *aff’d*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

<sup>141</sup> *Id.* at 628.

<sup>142</sup> *Id.*

<sup>143</sup> *Jota v. Texaco, Inc.*, 157 F.3d 153, 155, 159 (2d Cir. 1998) (consolidating two separate prior actions: *Aguinda v. Texaco Inc.*, No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994) and *Ashanga v. Texaco Inc.*, No. 94 Civ. 9266 (S.D.N.Y. Aug. 13, 1997)); *see* Boeving, *supra* note 25, at 119 n.65.

<sup>144</sup> *Aguinda v. Texaco (Aguinda III)*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002).

decision, Judge Rakoff concluded that “the specific claim plaintiffs purport to bring under the ATCA—that the Consortium’s oil extraction activities violated evolving environmental norms of customary international law . . . lacks any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss.”<sup>145</sup> He quoted with approval the Fifth Circuit’s statement that federal courts should avoid imposing American environmental policies on foreign governments.<sup>146</sup> The Second Circuit later affirmed the decision to dismiss the case on grounds of the FNC doctrine.<sup>147</sup>

The *Aguinda* and *Jota* decisions demonstrate the importance of the FNC doctrine in determining whether U.S. courts will take jurisdiction over an ATS case. Additionally, Judge Broderick and Judge Rakoff appeared to have philosophical differences in their attitudes toward environmental claims under the ATS. Judge Broderick appeared willing to consider broad principles in the Rio Declaration as the basis for the law of nations, although he did not make a final decision and cautioned that not all environmental harms rise to the level of violations of the law of nations.<sup>148</sup> Judge Rakoff was far more skeptical of adjudicating environmental claims under international law for fear that U.S. courts would try to impose U.S. approaches to environmental issues on other countries.<sup>149</sup>

#### D. Flores v. Southern Peru Copper, Corp

##### 1. The District Court’s Decision

In *Flores v. Southern Peru Copper, Corp.* (*Flores I*), Peruvian residents brought an ATS claim alleging that air pollution from defendant’s copper mining, refining, and smelting operations caused serious or fatal lung disease to them and their decedents in violation of their “right to life,” “right to health,” and right to “sustainable development” as recognized in international law.<sup>150</sup> The plaintiffs argued these rights are recognized as customary international law in several widely adopted international agreements including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Rio Declaration on Environment and Development.<sup>151</sup> The U.S. District Court

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<sup>145</sup> *Id.* at 552.

<sup>146</sup> *Id.* at 552–53 (“Federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments.” (quoting *Beanal III*, 197 F.3d 161, 167 (5<sup>th</sup> Cir. 1999))).

<sup>147</sup> *Aguinda v. Texaco (Aguinda IV)*, 303 F.3d 470, 477–80 (2d Cir. 2002).

<sup>148</sup> See *supra* notes 131–139 and accompanying text.

<sup>149</sup> See *supra* notes 140–142 and accompanying text.

<sup>150</sup> 253 F. Supp. 2d 510, 514 (S.D.N.Y. 2002), *aff’d*, 414 F.3d 233 (2d Cir. 2003); see Boeving, *supra* note 25, at 126–28.

<sup>151</sup> *Flores I*, 253 F. Supp. 2d at 519–20; see generally International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. “The States Parties to the present Covenant recognize the right of



for the Southern District of New York concluded that the plaintiffs had failed to demonstrate that these three rights were universally recognized because the Rio Declaration also recognized that nations have a sovereign right to exploit their resources and the Restatement (Third) generally recognized that each sovereign nation was responsible for controlling pollution within its borders.<sup>152</sup> The court rejected the plaintiffs' argument that there was an international law principle prohibiting "egregious" amounts of pollution, even if nations had sovereign responsibility for lesser levels of pollution, because it could find no support for that distinction in international law.<sup>153</sup> The court granted the defendants' motion to dismiss for lack of federal subject matter jurisdiction and failure to state a claim under the ATS because the plaintiffs had not "demonstrated that high levels of environmental pollution within a nation's borders, causing harm to human life, health, and development, violate 'well-established, universally recognized norms of international law.'"<sup>154</sup> The district court also dismissed the case under the FNC doctrine because it found that Peru was an adequate alternative forum.<sup>155</sup>

## 2. *The Court of Appeals' Decision*

On appeal, the Second Circuit affirmed the district court's decision that the plaintiffs had failed to establish subject matter jurisdiction or to state a claim under the ATS.<sup>156</sup> Judge Cabranes, writing for the court of appeals, concluded that the alleged rights to life, health, and sustainable development asserted by the plaintiffs were too "boundless and indeterminate" to establish binding customary international law recognizable under the ATS.<sup>157</sup> He rejected the plaintiffs' proposed "'shockingly egregious' standard for distinguishing torts that violate customary international law from those that merely violate domestic law" because there was no evidence that customary international law recognized such a distinction.<sup>158</sup> Additionally, Judge Cabranes rejected the plaintiffs' claim alleging that "egregious" intra-national pollution from the mining activities violated customary international environmental law because intra-national pollution, even if severe, is generally a concern of that particular nation alone and not a "mutual

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everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.* art. 12; *see* Rio Declaration, *supra* note 131, princ. 1 ("Human beings are . . . entitled to a healthy and productive life in harmony with nature."); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* <http://www.unhchr.ch/udhr/lang/eng.pdf> [hereinafter Universal Declaration] ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . .").

<sup>152</sup> *Flores I*, 253 F. Supp. 2d at 520–22.

<sup>153</sup> *Id.* at 522–24.

<sup>154</sup> *Id.* at 525 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980)).

<sup>155</sup> *Id.* at 531–41.

<sup>156</sup> *Flores II*, 414 F.3d 233, 266 (2d Cir. 2003).

<sup>157</sup> *Id.* at 255.

<sup>158</sup> *Id.* at 252–54.

concern” of the international community at large.<sup>159</sup> Since it held that the plaintiffs failed to state a claim under the ATS, the Second Circuit did not address the district court’s dismissal under the FNC doctrine.<sup>160</sup>

### *E. Environmental Decisions Before Sosa*

Before the district court’s 2002 decision in *Sarei I*, lower courts generally concluded that environmental claims failed to meet the specific or definable and universal and obligatory test used by *Filartiga* and many subsequent ATS decisions.<sup>161</sup> Lower courts have viewed environmental claims as less serious, specific, obligatory, or universally recognized than the widely accepted jus cogens norms prohibiting torture, genocide, war crimes, crimes against humanity, forced labor, and slavery.<sup>162</sup> Additionally, lower courts possibly may be more willing to dismiss environmental cases on discretionary grounds—such as FNC, international comity, the political question doctrine, or the act of state doctrine—and less likely to dismiss human rights cases.<sup>163</sup> The four cases above have suggested that ATS plaintiffs asserting environmental claims must either more carefully demonstrate that the defendant’s activities violate specific provisions of widely accepted environmental agreements or that their actions are intertwined with serious human rights abuses such as torture or forced labor that courts have accepted as the appropriate basis for ATS suits.<sup>164</sup>

In the four environmental cases discussed in this Section, federal courts generally took a relatively narrow view of the types of environmental claims that are cognizable under the ATS. None of the plaintiffs in these cases won a purely environmental claim under the ATS. Based on the Second Circuit’s *Flores II* decision, the Fifth Circuit’s *Beanal III* decision, the district court decision in *Amlon Metals*, and Judge Rakoff’s dicta in *Aguinda II*, courts are generally reluctant to treat broad principles or declarations in multinational environmental agreements as enforceable under the ATS. In *Amlon Metals*, the district court rejected the plaintiffs claims based on Principle 21 of the 1972 Stockholm Declaration because the Declaration did not “set forth any specific proscriptions, but rather refer[red] only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the

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<sup>159</sup> *Id.* at 253–55 & n.28, 266.

<sup>160</sup> *Id.* at 266.

<sup>161</sup> *See, e.g.,* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (suggesting the ATS applies to “a handful of heinous actions—each of which violates definable, universal, and obligatory norms”); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”); *Boeving*, *supra* note 25, at 129, 133; *Stephens*, *supra* note 74, at 553.

<sup>162</sup> *See* *Stephens*, *supra* note 74, at 553.

<sup>163</sup> *See* *Boeving*, *supra* note 25, at 128–29.

<sup>164</sup> *See* *Boeving*, *supra* note 25, at 129–30.

environment beyond their borders.”<sup>165</sup> Similarly, in *Flores II* the Second Circuit stated that the plaintiffs’ claims to a “right to life,” “right to health,” and right to “sustainable development” under the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the Rio Declaration on Environment and Development plaintiffs were “boundless and indeterminate . . . , expressing virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them.”<sup>166</sup> Likewise, in *Beanal III*, the Fifth Circuit asserted:

The sources of international law cited by Beanal and the *amici* [which included the polluter pays principle, the precautionary principle and the proximity principle] merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.<sup>167</sup>

Courts also emphasized that it was inappropriate to use ATS suits as a means to impose American environmental law or standards on foreign nations. The Fifth Circuit in *Beanal III* stated that “federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments . . . especially when the alleged environmental torts and abuses occur within the sovereign’s borders and do not affect neighboring countries.”<sup>168</sup> Judge Rakoff quoted that statement with approval in his opinion.<sup>169</sup>

Judge Broderick’s initial decision in *Aguinda I* suggested that an environmental plaintiff could establish a cognizable ATS claim based on Principle 2 of the Rio Declaration, although he limited the scope of that principle to preventing serious transboundary harms to other nations, which is a principle that has broad international acceptance.<sup>170</sup> This portion of his opinion appears to be at odds with *Amlon Metals*, which rejected considering transboundary harms under identical language in Principle 21 of the Stockholm Declaration.<sup>171</sup> Furthermore, he recognized not all harmful environmental conduct violates the law of nations and that American courts should hesitate to interfere with the decisions of other nations.<sup>172</sup> Because of his death, Judge Broderick never issued a final decision so it

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<sup>165</sup> *Amlon Metals, Inc. v. FMC Corp.* 775 F. Supp. 668, 671 (S.D.N.Y. 1991).

<sup>166</sup> *Flores II*, 414 F.3d 233, 255 (2d Cir. 2003).

<sup>167</sup> *Beanal III*, 197 F.3d 161, 167 (5th Cir. 1999).

<sup>168</sup> *Id.*

<sup>169</sup> *Aguinda III*, 142 F. Supp. 2d 534, 552–53 (S.D.N.Y. 2001), *aff’d*, 303 F.3d 470 (2d Cir. 2002).

<sup>170</sup> *See Aguinda I*, No. 93 Civ. 7527 (VLB), 1994 U.S. Dist. LEXIS 4718, at \*22 (S.D.N.Y. Apr. 11, 1994).

<sup>171</sup> *See supra* notes 105–106 and accompanying text.

<sup>172</sup> *Aguinda I*, 1994 U.S. Dist. LEXIS 4718 at \*24–25.

is impossible to know whether he would have accepted any of the plaintiffs' claims as valid under the ATS.

In *Beanal I*, the district court suggested that the plaintiff might establish a valid ATS claim for genocide if he could show that the defendant specifically intended to cause extreme environmental destruction, but concluded that the plaintiff's vague allegations that the environmental harms constituted "cultural genocide" were insufficient.<sup>173</sup> Further, the district court in *Beanal I* dismissed the plaintiffs' purely environmental allegations based on the polluter pays principle, the precautionary principle and the proximity principle because these principles were not universally recognized "in the international community as to their binding status and their content."<sup>174</sup> The *Beanal I* district court's greater willingness to consider genocide claims than purely environmental claims suggests that some courts may be more willing to consider ATS claims based on recognized human rights abuses that are a proxy for environmental harms.<sup>175</sup>

In *Flores II*, Judge Cabranes rejected an ATS claim based on pollution in one nation because such internal pollution did not raise a "mutual concern" of the international community.<sup>176</sup> Although *Flores II* did not address transboundary pollution because the plaintiffs did not allege that any of the pollution had an effect outside of Peru,<sup>177</sup> Judge Cabranes's "mutual concern" analysis implies that regulation of transboundary pollution is a concern of the international community and, therefore, that treaties or custom addressing such pollution are more likely to constitute customary international law than intra-national pollution. Similarly, the Fifth Circuit in *Beanal III* did not close the door to transboundary pollution claims.<sup>178</sup> Even in the case of transboundary pollution, however, courts would have to address whether international declarations such as the Rio Declaration that contain general prohibitions against serious transboundary pollution provide specific enforceable standards that could be enforced under the ATS.

Additionally, as Judge Rakoff's *Aguinda III* opinion demonstrates, even if a

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<sup>173</sup> *Beanal I*, 969 F. Supp. 362, 372–73 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

<sup>174</sup> *Id.* at 383–84 (citing PHILLIPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 183 (Vaughan Lowe & Dominic McGoldrick eds., 1995)).

<sup>175</sup> Boevig, *supra* note 25, at 117 n.51–52, 129–30, 134–40; see Bridgeman, *supra* note 101, at 2–3 ("Depending on how the remedies are crafted, however, the ATCA may be used as a successful proxy for . . . environmental claims where human rights abuses and environmental wrongs overlap.").

<sup>176</sup> *Flores II*, 414 F.3d 233, 247–66 (2d Cir. 2003).

<sup>177</sup> *Id.* at 255 n.29 ("Because plaintiffs do not allege that defendant's conduct had an effect outside the borders of Peru, we need not consider the customary international law status of transnational pollution.").

<sup>178</sup> See *Beanal III*, 197 F.3d 161, 167 (5th Cir. 1999) (holding only "that Beanal failed to show in his pleadings that Freeport's mining activities constitute environmental torts or abuses under international law" not that no such cause of action exists); see also Abadie, *supra* note 90, at 787 (discussing the *Beanal* court's willingness to consider a case that alleges transboundary damages).

plaintiff can establish a cognizable environmental human rights claim under the ATS, there is a significant possibility that a court will dismiss the case pursuant to the FNC doctrine if a foreign court in the nation that the violations occurred is capable of hearing the case. The district court in *Flores I* also invoked the FNC doctrine, although the Second Circuit did not address that ground for dismissal on appeal.<sup>179</sup> Judge Rakoff in his initial *Aguinda II* also used the international comity doctrine as a ground for dismissal, but he did not rely on that doctrine in his final decision.<sup>180</sup>

#### IV. SOSA V. ALVAREZ-MACHAIN

In 2004, the United States Supreme Court in *Sosa* held that courts may allow ATS suits based on modern customary international law norms, but only if those norms are comparable to the international law norms that were the grounds for ATS suits in 1789.<sup>181</sup> In 1990, a United States grand jury indicted Mexican national Humberto Alvarez-Machain for the torture and murder of a Drug Enforcement Agency (DEA) agent in Mexico.<sup>182</sup> Mexico refused to extradite Alvarez-Machain to the United States.<sup>183</sup> Mexican nationals hired by the DEA abducted Alvarez-Machain, briefly detained him overnight in a motel and brought him in a private plane to the United States where federal officers arrested him.<sup>184</sup> After being tried and acquitted, Alvarez-Machain returned to Mexico and filed suit under the ATS against Sosa, a Mexican citizen involved in the abduction.<sup>185</sup> In an en banc decision, the Ninth Circuit held that the plaintiff could sue under the ATS because there is a “clear and universally recognized norm” prohibiting arbitrary arrest and detention.<sup>186</sup>

##### A. The Majority Opinion: Opening the Door to ATS Claims, But How Far?

The *Sosa* Court adopted a relatively narrow interpretation of which modern norms of international law may serve as the basis of an ATS suit, but the Court

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<sup>179</sup> See *supra* notes 150–159 and accompanying text.

<sup>180</sup> See *supra* notes 140–142, 144–146 and accompanying text.

<sup>181</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–32 (2004) (“[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

<sup>182</sup> *Id.* at 697.

<sup>183</sup> *Id.* at 698.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* He also sued under Federal Tort Claims Act, 28 USCS §§ 1346(b)(1), 2671–80 (2006), against several DEA agents and the U.S. government. *Id.*

<sup>186</sup> *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003) (en banc), *rev’d*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The court also allowed him to sue DEA agents under the Federal Tort Claims Act, but that issue is beyond the scope of this Article. *Id.* at 640.

refused to adopt the “originalist” position that the statute is limited to only those norms that existed in 1789.<sup>187</sup> The Court unanimously agreed that the ATS’s text “is in terms *only* jurisdictional” and does not specifically authorize any causes of action.<sup>188</sup> Additionally, all members of the Court agreed that courts had historically interpreted the ATS’s jurisdiction to include common-law causes of action based on the small number of international law violations with a potential for personal liability that existed in 1789, such as offenses against ambassadors, violations of safe conduct, and possibly claims of piracy and prize claims involving seizures of ships.<sup>189</sup>

The *Sosa* majority acknowledged that there were five reasons why federal courts should be reluctant to allow ATS suits to address modern international law norms, but the majority did not find any of these reasons compelling enough to prohibit all suits based on modern international law.<sup>190</sup> First, Justice Souter observed that courts need to be more cautious about recognizing modern rights as enforceable under the ATS because modern courts have a far broader view of their discretion to create new rights through the common law than courts in 1789, when judges may have believed that they were simply discovering rights inherent in the common law.<sup>191</sup> Second, since its 1938 decision in *Erie Railroad Co. v. Tompkins*,<sup>192</sup> the Court has limited the authority of federal courts to make common law without congressional guidance.<sup>193</sup> Third, because the decision to create a private cause of action should usually be left to Congress, courts should be reluctant to establish a judicially based private cause of action.<sup>194</sup> Fourth, reflecting the concerns embodied in the act of state doctrine, the Court stated that courts should be concerned about the impact of suits on our foreign relations and therefore should be cautious about accepting ATS claims that seek “a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.”<sup>195</sup> Fifth, Congress had not explicitly authorized the Court to recognize new causes of action based on the evolution of international law.<sup>196</sup> The majority conceded that these five reasons “argue for great caution in adapting the law of nations to private rights,” but they disagreed with Justice Scalia’s dissenting opinion that the Court should refuse to

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<sup>187</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–31 (2004); see Boevig, *supra* note 25, at 131 (considering the spectrum of possible decision-making grounds, and concluding that the court “sought a middle ground” between originalism and jurisdictional expansion).

<sup>188</sup> *Sosa*, 542 U.S. at 729 (emphasis added); see Boevig, *supra* note 25, at 131.

<sup>189</sup> *Sosa*, 542 U.S. at 741, 745–48, 755; see Boevig, *supra* note 25, at 131–32.

<sup>190</sup> *Sosa*, 542 U.S. at 725–31.

<sup>191</sup> *Id.* at 725–26.

<sup>192</sup> 304 U.S. 64 (1938).

<sup>193</sup> *Sosa*, 542 U.S. at 726.

<sup>194</sup> *Id.* at 727.

<sup>195</sup> *Id.* at 727; see Boevig, *supra* note 25, at 135 (elaborating on potential causes of action that are likely foreclosed by this concern).

<sup>196</sup> *Sosa*, 542 U.S. at 728.

recognize any new causes of action under the ATS.<sup>197</sup>

Because federal courts had considered evolving international law norms for the last two centuries, Justice Souter's majority opinion concluded "that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."<sup>198</sup> The Court's reference to "vigilant doorkeeping" and its admonition that ATS suits should be limited "to a narrow class of international norms today" suggests that the Court wanted lower courts to recognize only a limited set of modern international law norms as suitable for ATS suits.<sup>199</sup> The Court next established a relatively narrow standard for ATS suits based on modern norms. Because there were only a few narrow and specific international law norms in 1789 when Congress enacted the ATS, the Court determined that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" under the ATS.<sup>200</sup> The Court concluded, "[a]ccordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."<sup>201</sup>

In setting a standard for Alvarez-Machain's case and presumably future cases, the Court looked to "historical antecedents."<sup>202</sup> Without specifying "the ultimate criteria for accepting a cause of action subject to jurisdiction" under the ATS, the Court stated that "we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."<sup>203</sup> The Court cited an 1820 case involving piracy as the sole example, *United States v. Smith*.<sup>204</sup> In *Smith*, Justice Story addressed both whether piracy was widely prohibited by the international community and "whether the crime of piracy is defined by the law of nations with

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<sup>197</sup> *Id.* at 728–30.

<sup>198</sup> *Id.* at 729.

<sup>199</sup> See Nelson P. Miller et al., *Federal Courts Enforcing Customary International Law: The Salutary Effect of Sosa v. Alvarez Machain on the Institutional Legitimacy of the Judiciary*, 3 REGENT J. INT'L L. 1, 23–25 (2005) (discussing the minimal amount of discretion created for lower courts, absent some kind of congressional action).

<sup>200</sup> *Sosa*, 542 U.S. at 725.

<sup>201</sup> *Id.* at 725; see Boeving, *supra* note 25, at 131–32 (elaborating on ramifications of this concern); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 121 (2004).

<sup>202</sup> *Sosa*, 542 U.S. at 731–32; see Kontorovich, *supra* note 201, at 121 (arguing that the Court's standard requires reference to what was "contemplated by the First Congress").

<sup>203</sup> *Sosa*, 542 U.S. at 732.

<sup>204</sup> *Id.* (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163–80 (1820) as "illustrating the specificity with which the law of nations defined piracy"); see Kontorovich, *supra* note 201, at 132 ("Piracy was . . . the paradigmatic offense against the law of nations . . .").

reasonable certainty.”<sup>205</sup> He concluded, “there is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . . all writers concur, in holding, that robbery . . . upon the sea, *animo furandi*, is piracy.”<sup>206</sup>

Some commentators have argued that *Sosa*’s standard is vague and provides little guidance to lower courts,<sup>207</sup> but its historically based, widely accepted, and definite-content prongs do have some value in limiting the potential number of modern law norms that can serve as the basis for ATS suits.<sup>208</sup> Even several critics who argue that the Court’s standard is vague acknowledge that the Court at least in dicta suggested a relatively restrictive approach that would significantly limit future ATS suits.<sup>209</sup> Because there are far more international agreements, customs,

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<sup>205</sup> *Smith*, 18 U.S. (5 Wheat.) at 160; see Kontorovich, *supra* note 201, at 140 (discussing factors used by federal courts to determine whether the law of nations possesses certainty).

<sup>206</sup> *Smith*, 18 U.S. (5 Wheat.) at 161; see Kontorovich, *supra* note 201, at 140–41 (discussing *Smith*); Christensen, *supra* note 43, at 1244–45 (same). A pirate acted without sovereign authorization; by contrast, international law did not treat as a criminal a lawful privateer acting under sovereign authorization such as letters of marque and reprisal. Kontorovich, *supra* note 201, at 141–42, 145–46, 148–49.

<sup>207</sup> See Benjamin Berkowitz, *Sosa v. Alvarez-Machain: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289, 290 (2005) (arguing that *Sosa* is unclear in explaining when courts should recognize customary international law claims); Christensen, *supra* note 43, at 1243–45; Brad R. Roth, *International Decision: Scope of Alien Tort Statute—Arbitrary Arrest and Detention as Violations of Custom*, 98 AM. J. INT’L L. 798, 804 (David D. Caron ed. 2004) (“[T]he *Sosa* decision announces the existence of strict limits to the power of courts to establish international law-based causes of action under the ATS, but does relatively little, in practical terms, to specify those limits.”); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 446, 454 (2004) [hereinafter *Leading Cases*] (arguing that both of the *Sosa*’s historical standards are vague and provide little guidance for lower courts).

<sup>208</sup> See Kontorovich, *supra* note 201, at 113 (“While *Sosa* may at first glance seem open-ended (or in the words of the dissent, ‘hardly . . . a recipe for restraint in future cases’) the inquiry that it demands is far more restrictive than may initially appear. *Sosa* contains the outlines of a rather demanding test to determine whether a particular international law claim can be subject to jurisdiction under the ATS.”); Miller et al., *supra* note 199, at 21 (“[I]f would-be activist courts are willing to be bound by the *spirit* of the *Sosa* opinion, then the fears of Justice Scalia’s *Sosa* concurrence may be assuaged. While the *Sosa* majority did not get it all right, and while it may have left the door ajar too far, it certainly pushed the door a long way in the right direction.”).

<sup>209</sup> See Berkowitz, *supra* note 207, at 290 (“[T]he Court’s cautious dicta regarding the recognition of new causes of action, may chill judicial incorporation of human rights norms.”); Christensen, *supra* note 43, at 1222 (“In addition to its transhistorical test, the Court admonished lower courts to exercise caution in granting new causes of action under the ATS.”); Roth, *supra* note 207, at 803 (“The *Sosa* decision seems to have been calculated to bring a sharp halt to the expansion of the scope of ATS-enabled claims.”); *Leading Cases*, *supra* note 207, at 451 (“The *Sosa* majority emphasized restraint in its assertion of ATS jurisdiction over claims arising from norms that have developed in



and norms today than there were in 1789, the acceptance prong of the test could be met by many widely accepted international agreements, declarations, or customs. The definite-content requirement is more likely to be a meaningful limitation on ATS claims because many international agreements use broad or vague language to avoid disagreements among potential signatories. In *Sosa*, the plaintiff's claim failed under the definite content criterion.<sup>210</sup>

Based on the lower court cases it cited, the *Sosa* decision may suggest that the Court intended to recognize only a narrow range of heinous human rights offenses as enforceable under the ATS. Citing with approval *Filartiga* and two other decisions, the Court contended that its test of modern ATS norms—those norms widely accepted and clearly defined as norms accepted in 1789—“is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.”<sup>211</sup> It is important to examine the language that the Court quoted in each of these three cases. The Court quoted the following language in *Filartiga*: “for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”<sup>212</sup> This quotation from *Filartiga* may imply that the Court only intended to allow ATS suits to enforce norms such as torture or war crimes that the international community finds as repulsive as piracy in 1789.<sup>213</sup> Similarly, the majority cited with approval Judge Edwards's concurring opinion in *Tel-Oren* in which he suggested that the “limits of section 1350's reach” are defined by “a handful of heinous actions—each of which violates definable, universal and obligatory norms.”<sup>214</sup> These two opinions suggest a very narrow range of “heinous” modern international law norms would be recognized in ATS suits, perhaps only *jus cogens* norms.

The third opinion the majority cited with approval, however, used the broader formula that the Ninth Circuit below had used to justify Alvarez-Machain's ATS

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customary international law since 1789.”).

<sup>210</sup> Kontorovich, *supra* note 201, at 121.

<sup>211</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

<sup>212</sup> *Id.* (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

<sup>213</sup> A number of commentators have analogized the heinousness of piracy to modern human rights offenses. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 794 (1988) (arguing that the rationale for universal jurisdiction over piracy was that the “fundamental nature” of the offense consisted of “particularly heinous and wicked acts”); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 80–81 (2001) (“Many of the crimes subject to the universality principle are so heinous in scope and degree that . . . any state may, as humanity's agent, punish the offender. . . . Piracy's fundamental nature and consequences explained why it was subject to universal jurisdiction. Piracy often consists of heinous acts of violence or depredation . . .”). *But see* Kontorovich, *supra* note 201, at 136–38 (arguing piracy “was not even regarded as particularly heinous, at least not in the way that modern human rights offenses are”).

<sup>214</sup> *Sosa*, 542 U.S. at 732 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

claim.<sup>215</sup> The majority cited with approval the Ninth Circuit's statement in *In re Estate of Ferdinand Marcos, Human Rights Litigation* that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."<sup>216</sup> Although *Marcos* itself involved allegations of serious human rights abuses including torture, summary execution, and disappearance,<sup>217</sup> Justice Scalia in his concurring opinion argued that the Ninth Circuit's test can be used by lower courts to recognize a very broad range of international law norms, including ones that the majority would likely reject such as the Ninth Circuit's opinion below that the majority had reversed.<sup>218</sup> Accordingly, the Supreme Court in *Sosa* did not clearly limit ATS claims to jus cogens norms, but may have allowed a somewhat broader range of customary international law claims.<sup>219</sup>

The Court closed its discussion of how lower courts should apply its standard for modern norms of international law with the observation that when courts decide which causes of action meet this standard they must exercise "judgment about the practical consequences of making that cause available to litigants in the federal courts."<sup>220</sup> The Court implied that lower courts should be cautious in recognizing ATS claims. Yet because the Court failed to provide a clear rule, it is likely that lower court judges will disagree about when allowing an ATS suit will have negative consequences on the judiciary, other branches of government, U.S. foreign policy, or foreign nations. In a footnote, the *Sosa* Court observed that other doctrines might further limit the availability of ATS suits, but it did not decide whether and when those doctrines might apply.<sup>221</sup> The Court stated that it would consider in "an appropriate case" the European Commission's argument as *amicus curiae* that international law required ATS plaintiffs to first exhaust any remedies available in the country where the alleged harms took place and "perhaps in other forums such as international claims tribunals."<sup>222</sup>

Additionally, the Court observed that in a future ATS case it might need to address how much deference courts should give to the political branches if either the executive or legislative branch objected to certain litigation.<sup>223</sup> As an example, the court discussed several class action suits pending in federal district courts in which plaintiffs sought damages from corporations that allegedly participated in or abetted the former South African government's systematic laws of racial

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<sup>215</sup> *Alvarez-Machain v. United States*, 331 F.3d 604, 621 (9th Cir. 2003) (en banc) (finding the norm against arbitrary arrest and detention in this case to be "universal, obligatory, and specific"), *rev'd*, 542 U.S. 692 (2004).

<sup>216</sup> *Sosa*, 542 U.S. at 732 (citing with approval *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

<sup>217</sup> *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1469.

<sup>218</sup> See *infra* notes 236–252 and accompanying text.

<sup>219</sup> See *Holt*, *supra* note 41, at 469–70.

<sup>220</sup> *Sosa*, 542 U.S. at 732–33.

<sup>221</sup> *Id.* at 733 n.21.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

discrimination called “apartheid.”<sup>224</sup> The current South African government has objected to these suits as contrary to its promotion of racial healing and forgiveness through its Truth and Reconciliation Commission and the United States has agreed that these suits are harmful.<sup>225</sup> The Court concluded that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”<sup>226</sup>

The *Sosa* decision’s “serious weight” standard for considering the objections of the executive or legislative branches provides limited guidance to lower courts in deciding how to balance the interests of litigants against those of the political branches. The one case cited by the court as an example of courts giving serious weight to the political branches was a sovereign immunity case where courts traditionally gave deference to the opinions of the executive branch.<sup>227</sup> The United States’ support of the democratically elected South African government’s objection to litigation that undermines its carefully negotiated process for national reconciliation is a relatively easy case for judicial deference.<sup>228</sup> In other cases where the United States has objected to ATS litigation because of the potential impact on business investments or foreign relations, plaintiffs have countered with submissions that challenge the factual assumptions of the executive branch’s objections.<sup>229</sup> In applying other jurisdictional doctrines the Supreme Court and lower courts have recognized that courts should not automatically defer to executive branch submissions urging the dismissal of a case, but must exercise independent judgment.<sup>230</sup> In contrast, the *Sosa* Court’s serious weight language suggests substantial deference to executive submissions, but it does not imply unlimited deference to such submissions.<sup>231</sup> As Part V will demonstrate, applying

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See *id.* (comparing *Austria v. Altmann*, 541 U.S. 677, 688–91 (2004); *Stephens*, *supra* note 74, at 561–62).

<sup>228</sup> *Stephens*, *supra* note 74, at 562.

<sup>229</sup> See *id.*

<sup>230</sup> See, e.g., *Regan v. Wald*, 468 U.S. 222, 243 (1984) (giving deference to executive branch’s views, but carefully reviewing the evidence submitted by the government); *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 772–73 (1972) (Douglas, J., concurring) (rejecting unquestioning deference by judiciary to executive branch submissions); *id.* at 773–96 (Powell, J., concurring) (same); *id.* at 778–80 (Brennan, J., dissenting) (same); *Washington Post Co. v. U.S. Dep’t of State*, 840 F.2d 26, 36–37 (D.C. Cir. 1988) (“[W]hatever weight the opinion of the [State] Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence.”), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990); Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department “Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L. J. 807, 818–20 (2006) (arguing separation of powers doctrine requires judiciary to examine whether executive branch submission urging dismissal of case is appropriate); *Stephens*, *supra* note 74, at 562–64 (same).

<sup>231</sup> Baxter, *supra* note 230, at 821–22.

the serious weight standard in the *Sarei* case is not easy because the plaintiffs raised important questions about the assumptions in the statement of interest (SOI). Additionally, changing circumstances since the case was filed may raise doubts about its continuing validity.

Ultimately, the Supreme Court reversed the court of appeals and held that the plaintiff could not sue under the ATS because no norm of customary international law prohibited his single illegal detention for less than one day that ended when he was transferred to lawful authorities in the United States.<sup>232</sup> The Court concluded that Alvarez-Machain's claim did not meet the Court's standard for international norms comparable to those recognized in 1789 because there is no clear and universally recognized norm of international law prohibiting arbitrary arrest and a brief detention lasting less than one day.<sup>233</sup> The Court observed that a prolonged arbitrary detention might violate customary international law, but it did not decide that question.<sup>234</sup>

### *B. Justice Scalia's Concurring Opinion*

In his opinion concurring in part and concurring in the judgment, Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, argued that federal courts no longer had the authority to incorporate new norms of international law into the ATS.<sup>235</sup> Justice Scalia argued that after the Court's 1938 *Erie* decision,<sup>236</sup> federal courts no longer have common-law-making authority and hence cannot adopt new norms of evolving international law.<sup>237</sup> Furthermore, Justice Scalia disagreed with allowing federal courts to selectively incorporate new norms into the ATS because, in his view, "the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform."<sup>238</sup> Under Justice Scalia's approach, ATS suits could be based, at most, only on the customary international law principles that existed in 1938 or a treaty of the United States.<sup>239</sup>

Justice Scalia made a strong argument that the majority's approach would allow lower courts to recognize many causes of action through the ATS even if the

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<sup>232</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733–38 (2004).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 737.

<sup>235</sup> *Id.* at 740–48 (Scalia, J., concurring).

<sup>236</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>237</sup> *Sosa*, 542 U.S. at 740–48 (Scalia, J., concurring).

<sup>238</sup> *Id.* at 739; *see* Boevig, *supra* note 25, at 132.

<sup>239</sup> Although not finally decided until 1941, the lengthy *Trail Smelter* arbitration between the United States and Canada that began in 1928 and involved a U.S. claim against a Canadian smelter for transboundary pollution is an example of a principle of customary international law that arguably was recognized in 1938. The initial report was issued in the case in 1931 and a "final decision" was issued on April 16, 1938. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941); *see* HUNTER ET AL., *supra* note 65, at 543–50.

majority intended that courts adopt only a far smaller number of modern norms.<sup>240</sup> He pointed out that the Ninth Circuit in *Alvarez-Machain* had employed the same “specific, obligatory, and universal” test for when international norms are actionable under the ATS as the *In re Estate of Ferdinand Marcos, Human Rights Litigation* opinion, which the majority had cited with approval.<sup>241</sup> Under this test, the Ninth Circuit in *Alvarez-Machain* found the plaintiff’s claims actionable under the ATS, which contradicts the majority’s conclusion that the court of appeals’ opinion “reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today.”<sup>242</sup> Justice Scalia pointedly observed that “endorsing the very formula that led the Ninth Circuit to its result in this action hardly seems to be a recipe for restraint in the future.”<sup>243</sup>

Justice Scalia also criticized the Second Circuit’s *Kadic* decision for recognizing a private right of action for genocide under the Convention on the Prevention and Punishment of the Crime of Genocide<sup>244</sup> even though Congress had explicitly stated that the treaty was not to be understood as creating any substantive or procedural rights enforceable in U.S. courts.<sup>245</sup> The *Kadic* decision had argued that it was not recognizing a new right, but simply an existing right under the ATS that Congress had not repealed by implication.<sup>246</sup> Justice Scalia argued that the majority opinion’s approach failed to prevent lower courts from expanding the ATS to allow new private causes of action that were at odds with the positions of the political branches.<sup>247</sup>

One may question Justice Scalia’s implication that his approach is the only one that would prevent lower courts from exercising unbridled discretion in recognizing new norms of international law.<sup>248</sup> Yet he made a strong argument that the majority’s test is loose enough to allow lower courts to enforce many international law norms through ATS suits that the majority would ultimately reject if they reviewed the case.<sup>249</sup> He concluded:

In today’s latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same

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<sup>240</sup> See *Sosa*, 542 U.S. at 747–48 (Scalia, J., concurring).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 748 (quoting *id.* at 737 n.27 (majority opinion)).

<sup>243</sup> *Id.*

<sup>244</sup> Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 278.

<sup>245</sup> *Sosa*, 542 U.S. at 748–49 (Scalia, J., concurring); see Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1092 (stating the Act shall not “be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding”).

<sup>246</sup> *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995).

<sup>247</sup> *Sosa*, 542 U.S. at 748–49 (Scalia, J., concurring).

<sup>248</sup> See *id.* at 746–50.

<sup>249</sup> See *id.* at 744.

formula the ambitious lower courts *themselves* have used—invites them to try again.<sup>250</sup>

Because the Court reviews only a “tiny fraction” of lower court opinions, he argued, the lower courts would recognize many norms that the Court would reject if it had the time to review those cases.<sup>251</sup> One lower court judge has agreed with Justice Scalia’s argument that the majority’s “open door” would result in inconsistencies among lower courts about whether they would recognize particular norms under the ATS.<sup>252</sup>

### C. Justice Breyer’s Concurring Opinion

In his opinion concurring in part and concurring in the judgment, Justice Breyer argued that courts should apply international comity principles in deciding whether it was appropriate for a court in the United States to hear a case based on alleged violations that occurred in a foreign country.<sup>253</sup> He suggested that comity considerations should limit ATS cases to heinous crimes that are both universally condemned and for which universal jurisdiction to prosecute is recognized.<sup>254</sup> He observed that eighteenth-century international law recognized that any nation that found a pirate could prosecute him regardless of where the piracy occurred.<sup>255</sup> Justice Breyer implied that ATS suits should be limited to the small number of modern human rights abuses for which international law similarly recognized universal jurisdiction: torture, genocide, slavery, crimes against humanity, and war crimes.<sup>256</sup> In the *Sosa* case, because there was no procedural consensus that claims of arbitrary arrest could be tried in any foreign court, Justice Breyer agreed that the Court should dismiss the plaintiff’s ATS claims.<sup>257</sup>

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<sup>250</sup> *Id.* at 750.

<sup>251</sup> *See id.* at 750–51.

<sup>252</sup> *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004) (“The consequences of leaving that door open, as Justice Scalia stated, were not only to make the task of the lower federal courts immeasurably more difficult, but also to invite the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision in *Sosa*.”).

<sup>253</sup> *Sosa*, 542 U.S. at 760–63 (Breyer, J., concurring in part and concurring in the judgment).

<sup>254</sup> *Id.* at 762.

<sup>255</sup> *Id.* (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820)); *see* Kontorovich, *supra* note 201, at 132 (“Piracy’s unique status as the benchmark for ATS claims is emphasized in Justice Breyer’s concurrence . . .”).

<sup>256</sup> *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (“Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. That subset includes torture, genocide, crimes against humanity, and war crimes.” (citations omitted)).

<sup>257</sup> *Id.* at 763.

*D. Sosa and International Environmental Law Claims*

In different ways, Justice Scalia's approach and Justice Breyer's approach would bar almost all environmental claims under the ATS. By only considering pre-1938, pre-*Erie*, customary international law, Justice Scalia would ignore the tremendous development of international environmental law since 1938. Under Justice Breyer's international comity approach, it would be very difficult to use the ATS to file an environmental claim because there may be no purely environmental norm that is recognized as allowing suit in any country. Perhaps only a suit alleging that a defendant has deliberately used environmental pollution or destruction to cause harm would rise to that level because it is arguably a crime against humanity or war crime. The environmental devastation caused when Saddam Hussein deliberately blew up Kuwaiti oil wells when his invasion of that country was repulsed is one example that might possibly meet Justice Breyer's views.<sup>258</sup> As will be discussed in Part V, the district court and court of appeals in *Sarei* considered whether the international comity doctrine justified the dismissal of the case, but did not apply as restrictive an approach as Justice Breyer's.

The majority's standard of allowing ATS suits only if an alleged violation of customary law is comparable to eighteenth-century violations is less clear than one might hope, but the Court's definite content requirement and its indication that lower courts should sparingly allow ATS suits suggests that the Court would approve the generally negative reception to environmental claims in *Beanal*, *Flores*, *Amlon*, and *Aguinda*. Based on its requirement that modern customary international law must have a definite content comparable to the piracy and ambassador offenses recognized in the eighteenth century, the Supreme Court would likely reject claims based on broad environmental doctrines such as sustainable development or a right to health that have no clear boundaries just as those four lower court decisions rejected broad theories of environmental liability.

*V. SAREI*

The district court's opinion in *Sarei I* was decided before the *Sosa* decision. After the Supreme Court's *Sosa* decision, the Ninth Circuit had the parties reargue the case so it could consider the impact of *Sosa* on the case.<sup>259</sup> In a 2006 decision, *Sarei v. Rio Tinto PLC*, a divided three-judge panel of the Ninth Circuit affirmed the district court's decision that UNCLOS constitutes customary international law

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<sup>258</sup> *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 130 (E.D.N.Y. 2005) (discussing Saddam Hussein's destruction of Kuwaiti oil wells as example of a violation of customary international law); Laura Edgerton, *Eco-Terrorist Acts During the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?*, 22 GA. J. INT'L & COMP. L. 151, 165-73 (1992) (discussing whether Saddam Hussein's destruction of Kuwaiti oil wells was a violation of international law).

<sup>259</sup> See *Sarei II*, 456 F.3d 1069, 1077 (9th Cir. 2006), *aff'd in part, vacated in part, rev'd in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007).

that is cognizable under the ATS.<sup>260</sup> On April 12, 2007, however, in response to the defendant's petition for rehearing and for rehearing en banc, the three-judge panel withdrew its 2006 opinion and issued a superseding opinion and dissent.<sup>261</sup> The majority did not decide whether the plaintiffs' substantive claims were valid, but did conclude that the allegations were sufficiently serious to warrant the exercise of federal jurisdiction.<sup>262</sup> The 2007 opinion appeared to be most concerned with avoiding deciding the UNCLOS claim on the merits. The 2007 opinion essentially adopted the same reasoning as the 2006 opinion in reversing the district court's dismissal of all claims as nonjusticiable political questions and vacating the district court's "dismissal of the UNCLOS claims on act of state and comity grounds, for reconsideration in light of [its] opinion."<sup>263</sup>

Even though they may not cite the Ninth Circuit's withdrawn 2006 decision, plaintiffs in the future will likely rely on its reasoning in trying to convince courts to recognize UNCLOS and other environmental claims under the ATS. Because there are likely to be future cases involving UNCLOS and other environmental claims under the ATS, it is important to analyze whether the Ninth Circuit's reasoning in its withdrawn 2006 decision was convincing. The Ninth Circuit's withdrawn 2006 decision failed to consider the definite content portion of the *Sosa* decision when the court of appeals affirmed the district court's conclusion that UNCLOS constitutes customary international law that is cognizable under ATS. The Ninth Circuit's 2007 decision avoided addressing the merits of the UNCLOS claim. On remand, the district court should hold that the UNCLOS claim is not cognizable under the ATS because the content of UNCLOS is not as definite as the norms recognized in 1789.

#### A. *Sarei v. Rio Tinto PLC—The District Court's Opinion*

##### 1. *The Plaintiffs' Allegations*

In *Sarei v. Rio Tinto PLC* (*Sarei I*), the plaintiffs, citizens of Papua New Guinea, alleged, inter alia, that defendant Rio Tinto's mining operations destroyed their island's environment and harmed the health of its people.<sup>264</sup> The defendant

<sup>260</sup> *Sarei II*, 456 F.3d 1069, 1078 (9th Cir. 2006).

<sup>261</sup> *Sarei III*, 487 F.3d 1193, 1196–97 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007). Judge Bybee in his dissenting opinion again argued that the plaintiffs must first exhaust any legal remedies available in Papua New Guinea; he did not address whether UNCLOS claims are cognizable under the ATS. *Sarei III*, 487 F.3d at 1224–46 (Bybee, J., dissenting).

<sup>262</sup> *Id.* at 1202 (majority opinion).

<sup>263</sup> *Id.* at 1224 (Bybee, J., dissenting).

<sup>264</sup> 221 F. Supp. 2d 1116, 1120 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *aff'd in part, vacated in part, rev'd in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007); see Boevig, *supra* note 25, at 123. The court also found that the plaintiffs' war crimes and crimes against humanity allegations presented cognizable ATS claims, but those issues are



allegedly dumped tailings from its mine into the Kawerong-Jaba river system, resulting in the destruction of the river valley, rain forests, and thousands of acres.<sup>265</sup> Furthermore, the tailings polluted the Empress Augusta Bay and killed many fish in the Bay, a major food source for the local population.<sup>266</sup> As is discussed below, the plaintiffs alleged that some of the tailings entered international waters and harmed the Pacific Ocean.<sup>267</sup>

## 2. *Rejecting a Right to Life or Health*

The plaintiffs alleged that the environmental harms described in the complaint violated the law of nations and caused human rights violations infringing upon a “right to life” and “right to health” recognized in international law.<sup>268</sup> Like the *Flores II* decision, the U.S. District Court for Central California in *Sarei* held that neither the “right to life” nor the “right to health” was sufficiently specific to form the basis for an ATS claim.<sup>269</sup> Furthermore, the court found “that nations [did not] universally recognize [that such rights] can be violated by perpetrating environmental harm.”<sup>270</sup> The court determined that some of the international conventions<sup>271</sup> relied upon by the plaintiff did not specifically address environmental harm, and those conventions that did address environmental harm did not provide “specific proscriptions” establishing mandatory international law.<sup>272</sup> The court cited *Beanal III* in concluding that mere “allegations of

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beyond the scope of this Article. *Sarei I*, 221 F. Supp. 2d at 1151 (holding plaintiffs can bring war crime and crimes against humanity claims under ATS against defendant Rio Tinto PLC); see Boeving, *supra* note 25, at 123–24.

<sup>265</sup> *Sarei I*, 221 F. Supp. 2d at 1123.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1162.

<sup>268</sup> *Id.* at 1156; see Boeving, *supra* note 25, at 124.

<sup>269</sup> *Sarei I*, 221 F. Supp. 2d at 1158; see Boeving, *supra* note 25, at 124.

<sup>270</sup> *Sarei I*, 221 F. Supp. 2d at 1158 (“Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations.” (citing *Aguinda I*, 1994 U.S. Dist. LEXIS 4718, at \*7 (S.D.N.Y. Apr. 11, 1994))); see Boeving, *supra* note 25, at 124.

<sup>271</sup> Plaintiffs relied on the International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration, *supra* note 151; American Declaration on the Rights and Duties of Man, art. III, O.A.S. Res. XXX, Ninth International Conference of American States, O.A.S. Doc. OEA/Ser. L/I.4 Rev. (1965) [hereinafter American Declaration]; American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; African Charter of Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58, 1520 U.N.T.S. 217; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221; and the Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. See *Sarei I*, 221 F. Supp. 2d at 1156; Boeving, *supra* note 25, at 124 n.106.

<sup>272</sup> *Sarei I*, 221 F. Supp. 2d at 1159; see Boeving, *supra* note 25, at 124–25.

environmental harm do not state a claim under the law of nations.”<sup>273</sup>

### 3. Sustainable Development

The plaintiffs also argued that environmental harm alone violated the international law norms of sustainable development, which require States to avoid serious and irreversible environmental or human health impacts from development actions.<sup>274</sup> As in the *Flores II* decision, the district court in *Sarei I* concluded that the principle of sustainable development was far too broad to create a cause of action under the ATS because even the plaintiffs’ expert could not identify the limits of that “right.”<sup>275</sup>

### 4. UNCLOS

The district court next considered whether UNCLOS constituted a “specific, universal, and obligatory” norm of the type that would support a claim for violation of the law of nations.<sup>276</sup> The plaintiffs asserted that Rio Tinto’s mining activities violated two provisions of UNCLOS:

- (1) one requiring that states take “all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment” that involves “hazards to human health, living resources and marine life through the introduction of substances into the marine environment;”<sup>277</sup> and
- (2) another mandating that States “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources.”<sup>278</sup>

Because 166 nations had ratified the treaty, the district court concluded that

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<sup>273</sup> *Sarei I*, 221 F. Supp. 2d at 1159 (citing *Beanal III*, 197 F.3d 161, 167 (5th Cir. 1999)); see Boeving, *supra* note 25, at 125.

<sup>274</sup> *Sarei I*, 221 F. Supp. 2d at 1160; see Boeving, *supra* note 25, at 125; UNCLOS, *supra* note 5.

<sup>275</sup> *Sarei I*, 221 F. Supp. 2d at 1160–61; see Boeving, *supra* note 25, at 125. The Plaintiff’s expert acknowledged that sustainable development may be “too broad a concept to be legally meaningful.” *Sarei I*, 221 F. Supp. 2d at 1160.

<sup>276</sup> *Sarei I*, 221 F. Supp. 2d at 1160.

<sup>277</sup> The first alleged UNCLOS violation refers to Article 194 and a paraphrase of Article 1(4), which defines “pollution of the marine environment.” UNCLOS, *supra* note 5, art. 1(4).

<sup>278</sup> *Sarei I*, 221 F. Supp. 2d at 1161 (quoting Plaintiff’s Memorandum of Points and Authorities in Opp. to Motion to Dismiss at 32–33). The second alleged UNCLOS violation refers to Article 207, which addresses land-based pollution. UNCLOS, *supra* note 5, art. 207.

UNCLOS “appears to represent the law of nations.”<sup>279</sup>

The district court also concluded as an additional factor that the United States had recognized UNCLOS as a norm of international law.<sup>280</sup> In a footnote, the Supreme Court in *United States v. Alaska* stated that “[t]he United States has not ratified [UNCLOS], but has recognized that its baseline provisions reflect customary international law.”<sup>281</sup> Additionally, the United States had signed the treaty, although the Senate has not yet ratified it.<sup>282</sup> When the President has signed a treaty that the Senate has neither ratified nor rejected, the United States under international law principles is required to avoid actions that would defeat the treaty’s purposes.<sup>283</sup> The district court in *Sarei* concluded that the plaintiffs could file an UNCLOS claim under the ATS because the convention was now a part of customary international law.<sup>284</sup>

There are serious weaknesses in the district court’s analysis of whether

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<sup>279</sup> *Sarei I*, 221 F. Supp. 2d at 1161; see *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 624–25 (E.D. Tex. 2006); *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 175 n.3 (D.P.R. 1999) (“[T]here is a consensus among commentators that the provisions contained in UNCLOS III reflect customary international law and are thus binding on the United States, as well as all other nations, signatory or non-signatory.”), *aff’d on other grounds*, 198 F.3d 297 (1st Cir. 1999); LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1383–84 (4th ed. 2001) (stating most provisions of the UNCLOS are clearly established customary law of the sea).

<sup>280</sup> *Sarei I*, 221 F. Supp. 2d at 1132, 1161. *But see* David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, 542 NAT’L POL’Y ANALYSIS (Aug. 2006), <http://www.nationalcenter.org/NPA542LawoftheSeaTreaty.html> (last visited Sept. 14, 2007) (criticizing UNCLOS and arguing United States should not ratify it).

<sup>281</sup> 503 U.S. 569, 588 n.10 (1992); see *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (finding United States recognizes 200-mile economic zone in UNCLOS, although it has not ratified Convention); *Kun Yun Jho*, 465 F. Supp. 2d at 624–25.

<sup>282</sup> *Sarei I*, 221 F. Supp. 2d at 1161; see John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1 (2005/2006) (discussing why Senate has delayed ratifying UNCLOS and arguing in favor of ratification). *But see* Michalski, *supra* note 93, at 752 (arguing “the Ninth Circuit failed to recognize that the United States has consistently refused to ratify the convention because of the ‘risk that the United States—and other parties to the treaty—may lose control of their environmental laws’” (quoting Ridenour, *supra* note 280)); Ridenour, *supra* note 280 (observing that the Senate has not ratified UNCLOS despite the recommendation of the Senate Judiciary Committee in 2004 that it do so and that “[t]he Senate Foreign Relations Committee determined that the risks to U.S. military activity were sufficient enough to address them in its Committee Report”).

<sup>283</sup> *Sarei I*, 221 F. Supp. 2d at 1161; see *Kun Yun Jho*, 465 F. Supp. 2d at 624–25; *Mayaguezanos*, 198 F.3d at 305 n.14 (“[W]e also note that the United States ‘is obliged to refrain from acts that would defeat the object and purpose of the agreement.’” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1987))); *United States v. Royal Caribbean Cruises, Ltd.*, 24 F. Supp. 2d 155, 159 (D.P.R. 1997).

<sup>284</sup> *Sarei I*, 221 F. Supp. 2d at 1162; see Boevig, *supra* note 25, at 125.

UNCLOS codifies established norms of customary international law. Although it referred several times to the “specific, universal, and obligatory” standard used by the Ninth Circuit to decide whether an international law principle is enforceable through the ATS,<sup>285</sup> the district court never specifically addressed whether the UNCLOS provisions relied upon by the plaintiffs met that standard.<sup>286</sup> The district court implied that UNCLOS is universal and obligatory when it emphasized the number of nations that had ratified UNCLOS and that the United States recognizes some provisions as “baseline provisions” of customary international law.<sup>287</sup> The district court did not, however, address whether the UNCLOS provisions cited by the plaintiffs were specific enough to be actionable. Perhaps the district court implicitly concluded that the UNCLOS provisions cited by the plaintiffs were more specific than the “right to life,” “right to health,” and sustainable development claims that it had rejected, but the court did not analyze UNCLOS provisions in any depth.

Even if UNCLOS represents customary international law, the defendants argued that the convention was inapplicable to the facts of the case because it only governs the “open sea”—international waters located beyond the twelve-mile limit of sovereign territorial jurisdiction.<sup>288</sup> The defendants argued that the plaintiffs’ allegations that waste from the mine traveled “several kilometers” into Empress Bay failed to meet UNCLOS’s open sea requirement.<sup>289</sup> The district court rejected the defendants’ argument that the plaintiffs’ allegations failed to meet UNCLOS’s jurisdiction because the court found that the plaintiffs’ allegations that the tailings had traveled “dozens of miles” to pollute the Bay and had also polluted the Pacific Ocean were sufficient to withstand a motion to dismiss, pending further factual development.<sup>290</sup> If the case proceeds to trial, the plaintiffs would have to demonstrate that toxic materials from the mine reached international waters more than twelve miles from Papua New Guinea.<sup>291</sup> Additionally, the court concluded that ATS plaintiffs do not need to exhaust national remedies before filing suit under the statute, even if the defendants were correct that UNCLOS imposes such a requirement.<sup>292</sup>

##### 5. *Forum Non Conveniens*

The court next addressed the defendants’ motion to dismiss the case on FNC grounds because Papua New Guinea was an adequate forum, or, alternatively, that Australia was a more appropriate forum than the United States to try the case.<sup>293</sup>

<sup>285</sup> *Sarei I*, 221 F. Supp. 2d at 1132, 1137, 1157–61, 1163.

<sup>286</sup> Abadie, *supra* note 90, at 793.

<sup>287</sup> *Sarei I*, 221 F. Supp. 2d at 1161; *see* Abadie, *supra* note 90, at 793–94.

<sup>288</sup> *Sarei I*, 221 F. Supp. 2d at 1162.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 1162–63.

<sup>291</sup> Abadie, *supra* note 90, at 793–94.

<sup>292</sup> *Sarei I*, 221 F. Supp. 2d at 1162–63; *see infra* Part V.B.3.

<sup>293</sup> *Sarei I*, 221 F. Supp. 2d at 1166, 1175. The defendants also mentioned Great

Although the defendants were able to show that Papua New Guinea courts allow class actions and contingency fees, the court concluded that Papua New Guinea was not an adequate forum because the plaintiffs presented sufficient evidence that they would have difficulty finding a local attorney who would be willing to represent them under a contingent-fee arrangement and that crucial witnesses would not testify in Papua New Guinea courts because of fear resulting from the country's recently ended ten-year civil war.<sup>294</sup> The court suggested that the ATS expresses a policy preference for deciding international law issues in American courts, especially if the plaintiff is a lawful U.S. resident.<sup>295</sup> While the plaintiffs might be able to raise common-law tort claims in Australia, the court concluded that Australia was an inadequate forum because many of the plaintiffs' ATS claims were not recognized under Australian law.<sup>296</sup>

#### 6. *The State Department's Statement of Interest*

The defendants also sought to dismiss the complaint on the basis that it presented only nonjusticiable questions for three reasons: (1) the act of state doctrine, (2) the comity of nations doctrine, and (3) the political question doctrine.<sup>297</sup> To assist it in evaluating the applicability of these doctrines, the court solicited the Department of State's opinion regarding the possibility that the case's adjudication would detrimentally impact foreign relations.<sup>298</sup> The court observed that other decisions had considered the State Department's views before deciding a case.<sup>299</sup> On November 5, 2001, the Attorney General, acting on behalf of the Department of State, filed a Statement of Interest (SOI) of the United States under 28 U.S.C. § 516 and § 517 that attached an October 31, 2001 letter from the State Department that argued that the suit "would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations."<sup>300</sup> The district court then allowed the plaintiffs and defendants to file responses to the SOI.<sup>301</sup>

The district court gave conclusive weight to the Department of State's SOI as to whether the litigation of the case would harm U.S. foreign relations and the peace process in Papua New Guinea.<sup>302</sup> Rejecting the plaintiffs' argument that the

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Britain as a possible alternative forum, but the defendants and court focused on Australia, and the court did not clearly decide whether Britain was an appropriate forum, although the lack of discussion by the court may indicate that it did not view Britain as a serious alternative. *Id.* at 1166, 1175–78.

<sup>294</sup> *Id.* at 1166–75.

<sup>295</sup> *Id.* at 1175; see Hagen & Michaels, *supra* note 35, at 131.

<sup>296</sup> *Sarei I*, 221 F. Supp. 2d at 1175–78.

<sup>297</sup> *Id.* at 1178–79.

<sup>298</sup> *Id.* at 1179–81.

<sup>299</sup> *Id.* at 1179–80.

<sup>300</sup> *Id.* at 1181 (quoting Statement of Interest of the United States filed in the case).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 1181–82; see Baxter, *supra* note 230, at 836–37.

State Department had misunderstood the impact that the litigation would have on the Bougainville peace agreement, the court stated, “the court must accept the statement of foreign policy provided by the executive branch as conclusive of its view of that subject; it may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning.”<sup>303</sup> The court refused to consider evidence from the plaintiffs arguing that the Papua New Guinea government had misled the State Department regarding the impact of the litigation on the peace process because investigating this issue would interfere with the executive branch’s prerogatives in conducting foreign affairs and thus violate the separation of powers.<sup>304</sup>

### 7. *The Act of State Doctrine*

The district court next considered whether the act of state doctrine required the dismissal of the environmental and other ATS claims.<sup>305</sup> Pursuant to the act of state doctrine, a federal court may not adjudicate a claim if a decision would require a court to “invalidate a foreign sovereign’s official acts within its own territory” and, therefore, interfere with the executive branch or legislative branch’s conduct of foreign policy, especially with that foreign sovereign.<sup>306</sup> The act of state doctrine bar to litigation applies only if the outcome of the case “involves (1) an official act of a foreign sovereign, (2) performed within its own territory, and (3) seeks relief that would require the court to declare the foreign sovereign’s act invalid.”<sup>307</sup>

In *Sarei I*, the defendants argued that the plaintiffs’ environmental claims were barred under the act of state doctrine because its mining activities were pursuant to a Copper Agreement between its subsidiary, Rio Tinto, and the Papua New Guinea government, which was later codified.<sup>308</sup> Because all of its mining activities were regulated under Papua New Guinea law, the defendants argued that the plaintiffs’ environmental claims would improperly require the court to judge whether Papua New Guinea’s acts as a foreign sovereign in regulating mining violated the law of nations.<sup>309</sup>

Although the defendants sought to dismiss only the environmental claims under the act of state doctrine, the district court decided to consider whether all of the claims were barred under the doctrine.<sup>310</sup> In *Banco Nacional de Cuba v. Sabbatino*, a key act of state case, the Supreme Court applied a balancing approach to decide if adjudication of international law claims would violate the act of state doctrine by interfering too much with a foreign nation’s sovereignty and, as a

<sup>303</sup> *Sarei I*, 221 F. Supp. 2d at 1181–82 (footnote and citations omitted).

<sup>304</sup> *Id.* at 1182.

<sup>305</sup> *Id.* at 1183–88; see Boeving, *supra* note 25, at 125.

<sup>306</sup> *Sarei I*, 221 F. Supp. 2d at 1183.

<sup>307</sup> *Id.* at 1184 (citations omitted).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 1184–85.

result, the United States' foreign relations with that country.<sup>311</sup> Thus, if the defendant demonstrates that a government acted in its sovereign capacity and has a serious interest in the issue being adjudicated, a court then examines whether the three factors "set forth in *Sabbatino*—international consensus; impact on foreign relations; and the continued existence of the government—support or undermine application of the act of state doctrine to bar plaintiffs' claims."<sup>312</sup>

In *Sarei I*, the district court observed that the defendants had the burden of proving that the act of state doctrine applies.<sup>313</sup> Reviewing the defendants' argument that the act of state doctrine barred the case's litigation in U.S. courts, the court first considered whether the case required it to adjudicate a foreign sovereign's actions. Next, the court applied the *Sabbatino* factors to balance the need for adjudication in the United States with possible interference with the foreign nation's sovereignty and U.S. foreign relations.

First, because the plaintiffs alleged that Rio Tinto and the government of Papua New Guinea were joint venture partners who acted in concert in allegedly violating customary international law in the construction and operation of the mine, and because their joint relationship was officially codified in the Copper Agreement, the court found that "there is a strong likelihood that the court will be required to assess the legality of [Papua New Guinea's] official conduct."<sup>314</sup> Since the plaintiffs had alleged that the defendant was a state actor, which is a necessary element in proving the UNCLOS and racial discrimination claims, the district court rejected as inconsistent the plaintiffs' attempt to argue that the act of state doctrine should not apply because only Rio Tinto was responsible for the pollution when Papua New Guinea had the "power to control and monitor pollution generated by the mine."<sup>315</sup> Thus, as the plaintiffs' claims regarding the defendants' liability were based on its alleged joint venture with the national government as codified in the Copper Agreement and their joint construction and operation of the mine, the court concluded that it must dismiss the environmental and racial discrimination claims based on the act of state doctrine because it could find violations against the defendant only if it also found that Papua New Guinea's "official acts were invalid as well."<sup>316</sup> On the other hand, the court found that the act of state doctrine did not bar the plaintiffs' claims based on torture or war crimes as such actions, if true, are never considered official acts of state because they violate fundamental norms of international law.<sup>317</sup>

The district court next applied the three *Sabbatino* factors to the environmental and racial discrimination claims. First, under the degree of international consensus factor, the court found that there was international consensus regarding the enforcement of UNCLOS under international law, but that

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<sup>311</sup> 376 U.S. 398, 428 (1964); see *Sarei I*, 221 F. Supp. 2d at 1185.

<sup>312</sup> *Sarei I*, 221 F. Supp. 2d at 1185.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 1185–87.

<sup>315</sup> *Id.* at 1187 n.260.

<sup>316</sup> *Id.* at 1188.

<sup>317</sup> *Id.*

there was no consensus regarding whether the other environmental tort claims were violations of international law.<sup>318</sup>

Second, under the implications for foreign relations factor, the district court gave great weight to the SOI. In the SOI, the State Department argued that the suit “would risk a potentially serious adverse impact on the peace process” and thus harm the United States’ foreign relations with Papua New Guinea.<sup>319</sup> The court rejected the plaintiffs’ argument that the Department of State’s concerns were based on erroneous information supplied in a statement by the Papua New Guinea government because the State Department’s assessment did not rely solely on the country’s statement in issuing its opinion about the impact of the litigation on the peace process, but also “expressions of concern from countries it regards as allies.”<sup>320</sup> Although the views of the State Department in an SOI are not conclusive when a court addresses the act of state doctrine, the court found that there was not a single case in which a court had allowed a suit to proceed in light of concerns as serious as expressed in this SOI.<sup>321</sup> Thus, the court found that the second *Sabbatino* factor weighed in favor of dismissing the case.<sup>322</sup>

Finally, the third *Sabbatino* factor is whether the government allegedly responsible for the alleged international law violations is still in existence at the time of the suit.<sup>323</sup> The district court found that there was no evidence that the “control” of the Papua New Guinea government had changed since the alleged claims in the suit and therefore that the third factor weighed in favor of dismissing the suit.<sup>324</sup>

Thus, because the third and especially the second *Sabbatino* factors weighed against the court hearing the case, the district court dismissed the environmental and racial discrimination claims under the act of state doctrine.<sup>325</sup> The district court explained that the second *Sabbatino* factor of potential for interference with our foreign relations was the “touchstone” or “crucial element” in making its decision.<sup>326</sup> As the Ninth Circuit later concluded, it is fair to say that the SOI was the most important factor in the district court’s dismissal of the environmental and racial discrimination claims under the act of state doctrine.<sup>327</sup>

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<sup>318</sup> *Id.* at 1189–90. The court found a “high degree of consensus” that official acts of racial discrimination violate jus cogens principles of customary international law. *Id.*

<sup>319</sup> *Id.* at 1190–92.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 1192.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 1192–93.

<sup>324</sup> *Id.* at 1193. By the time that the Ninth Circuit decided the case on appeal, there was an apparent issue regarding whether the government was still in existence and the Ninth Circuit remanded the case to the district court for further fact finding on that issue.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* (quoting *Liu v. P.R.C.*, 892 F.2d 1419, 1432 (9th Cir. 1989)).

<sup>327</sup> *Sarei I*, 221 F. Supp. 2d at 1205 (explaining that “based on . . . the [SOI], it would be appropriate to refrain from exercising jurisdiction in this case”).



### 8. *The Political Question Doctrine*

The district court next addressed whether the political question doctrine required it to dismiss all claims because federal court involvement in the case would interfere with foreign relations between the United States and Papua New Guinea.<sup>328</sup> The political question doctrine requires courts to consider whether the adjudication of a case raises issues that are more appropriately decided by the politically elected legislative or executive branches, although there is controversy about whether the doctrine is a mandatory jurisdictional or a discretionary prudential limitation on the authority of federal courts.<sup>329</sup> Most frequently, the doctrine is applied to bar adjudication of cases that would significantly interfere with U.S. foreign relations.<sup>330</sup>

Relying on the SOI, the district court found that the suit would interfere with the State Department's support for the Papua New Guinea government and its efforts to negotiate a peace agreement in Bougainville.<sup>331</sup> Applying a six-factor test from the Supreme Court's *Baker v. Carr* decision,<sup>332</sup> the district court concluded that the suit would violate at least two factors, the impossibility of the courts undertaking independent resolution without expressing lack of respect for coordinate branches of government, and the potentiality of embarrassment to our country from "multifarious pronouncements by various departments on one question."<sup>333</sup> Accordingly, the district court dismissed all of the plaintiffs' claims pursuant to the political question doctrine.<sup>334</sup>

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<sup>328</sup> *Id.* at 1193–99; see Boeving, *supra* note 25, at 126 n.117.

<sup>329</sup> *Sarei I*, 221 F. Supp. 2d at 1193 n.273.

<sup>330</sup> *Id.* at 1193–94.

<sup>331</sup> *Id.* at 1196–99.

<sup>332</sup> 369 U.S. 186 (1962). The six factors are:

- (1) "the existence of any] textually demonstrable constitutional commitment of the issue to a coordinate political department";
- (2) "a lack of judicially discoverable and manageable standards for resolving [the claims]";
- (3) "the impossibility of deciding without an initial, [nonjudicial], policy determination";
- (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due for the coordinate branches of government";
- (5) "an unusual need for unquestioning adherence to a political decision already made"; and
- (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

*Id.* at 217.

<sup>333</sup> *Sarei I*, 221 F. Supp. 2d at 1197–99 (quoting factors four and six in *Baker*, 369 U.S. at 217).

<sup>334</sup> *Id.* at 1198–99.

### 9. *The International Comity Doctrine*

The court also considered the doctrine of international comity as an alternative ground for dismissing the environmental and racial discrimination claims because of compensation remedies in Papua New Guinea law.<sup>335</sup> International comity is a discretionary doctrine under which a court may defer to the laws or interests of a foreign country and decline to exercise the jurisdiction it otherwise would have for reasons of practice, convenience, or expediency.<sup>336</sup> Pursuant to § 403(2) of the Restatement (Third), there are eight factors that a court may consider in determining whether it should invoke the international comity doctrine.<sup>337</sup> Perhaps the most important Restatement factor is whether there is a conflict between the laws of the interested states; in this case, between American and Papua New Guinea law.<sup>338</sup>

The district court concluded that there was a direct conflict between the ATS and Papua New Guinea's 1995 Compensation Act, which "prohibit[s] the taking or pursuing in foreign courts of legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in Papua New Guinea," because the ATS allows federal courts to hear the plaintiffs' claims, but the Compensation Act prohibits plaintiffs from filing the claims other than in Papua New Guinea courts.<sup>339</sup> Papua New Guinea initially did not assert its right under the Compensation Act, but later did in a statement issued to the U.S. ambassador to Papua New Guinea in 2001.<sup>340</sup> Because of the conflict between the ATS and the Compensation Act, the district court found that the defendants had met the threshold requirement for invoking the international comity doctrine.<sup>341</sup> The district court concluded that it was appropriate to dismiss the environmental and racial discrimination claims pursuant to the international comity doctrine for three reasons: first, the SOI asserted that litigating the ATS claims in federal court would be detrimental to United States interests; second, the alleged conduct occurred solely in Papua New Guinea; and, third, all of the plaintiffs except Sarei were Papua New Guinea residents.<sup>342</sup>

In *Jota v. Texaco, Inc.*, the Second Circuit had held that the comity doctrine should be applied only if there was an adequate forum in the objecting country.<sup>343</sup> By contrast, the Supreme Court in *Quackenbush v. Allstate Ins. Co.* implied but did not decide that the comity doctrine could be applied without considering all the

<sup>335</sup> *Id.* at 1199–1206; *see* Boeving, *supra* note 25, at 126 n.118.

<sup>336</sup> *Sarei I*, 221 F. Supp. 2d at 1199.

<sup>337</sup> *Id.* at 1199–1200; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

<sup>338</sup> *See Sarei I*, 221 F. Supp. 2d at 1200–01.

<sup>339</sup> *Id.* at 1201–02.

<sup>340</sup> *Id.* at 1202–03.

<sup>341</sup> *Id.* at 1204.

<sup>342</sup> *Id.* at 1205–07.

<sup>343</sup> 157 F.3d 153, 160 (2d Cir. 1998).

factors considered in a FNC motion, which would include a decision on whether there is an adequate forum.<sup>344</sup> The district court did not resolve whether *Jota* was inconsistent with *Quackenbush* because it found that Papua New Guinea was an adequate forum.

Although it had considered the plaintiffs' fears of appearing in Papua New Guinea courts in assessing whether private interests favor an FNC dismissal, the district court found that the plaintiffs' fears did not make Papua New Guinea an inadequate forum because the defendants had represented that they would not seek to bar the plaintiffs from filing a claim under the Compensation Act, even though the Act prohibits bringing a second action in Papua New Guinea. The court made all of its dismissals—whether under comity, act of state, or political question grounds—contingent upon the defendants' consent to allowing the action to proceed in Papua New Guinea courts, despite the provision in the Compensation Act or other statutes that might bar adjudication there.<sup>345</sup>

The court refused to dismiss the war crimes and crimes against humanity claims under the international comity doctrine because they are outside the mining operations covered by the Compensation Act, but instead involved the Papua New Guinea's alleged actions during the civil war in Bougainville.<sup>346</sup> Additionally, because comity is a discretionary doctrine, the court refused to apply the doctrine to these claims because they involved egregious alleged conduct that may not be characterized as an act of state.<sup>347</sup> Although it had deferred to the SOI in dismissing all claims under the political question doctrine, the court did not believe that dismissal of the war crimes and crimes against humanity claims was appropriate under the comity doctrine even in light of the foreign relations concerns raised in the SOI.<sup>348</sup> The court believed its refusal to dismiss these claims for comity reasons was "particularly true" in light of the fact that the SOI itself stated that the State Department had expressed concerns to Papua New Guinea about alleged human rights abuses during the civil war.<sup>349</sup>

#### 10. *The SOI Was the Key to the District Court's Decision*

The district court gave conclusive weight to the SOI in making its decision to dismiss all claims under the political question doctrine.<sup>350</sup> The court also relied on the SOI to dismiss the environmental and racial discrimination claims under the act

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<sup>344</sup> 517 U.S. 706, 723 (1996) ("[F]ederal courts abstain [on comity grounds] out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism. Dismissal for *forum non conveniens*, by contrast, has historically reflected a far broader range of considerations . . . ." (internal citations omitted)).

<sup>345</sup> *Sarei I*, 221 F. Supp. 2d at 1208–09.

<sup>346</sup> *Id.* at 1207.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 1207 n.295.

<sup>349</sup> *Id.*

<sup>350</sup> See Baxter, *supra* note 230, at 836–37.

of state and international comity doctrines, although it refused to dismiss the war crimes and crimes against humanity claims under those two doctrines.<sup>351</sup> Thus, a crucial question on appeal was whether the district court had given too much deference to the SOI.<sup>352</sup>

*B. Sarei—The Ninth Circuit’s Partial Affirmance,  
Reversal and Remand in its Withdrawn 2006 Decision*

Because the Ninth Circuit’s withdrawn 2006 decision discussed whether an alleged violation of UNCLOS can establish a cognizable ATS claim, it is important to analyze the 2006 decision in detail even though it no longer has official legal recognition. Even though they may not cite the Ninth Circuit’s withdrawn 2006 decision, plaintiffs in the future will likely rely on its reasoning in trying to convince courts to recognize UNCLOS and other environmental claims under the ATS. Thus, because there are likely to be future cases involving UNCLOS and other environmental claims under the ATS, it is important to analyze whether the Ninth Circuit’s reasoning in its withdrawn 2006 decision was convincing. After the Supreme Court’s *Sosa* decision, the Ninth Circuit requested reargument in *Sarei* so the parties could address any changes in the law resulting from *Sosa*.<sup>353</sup> This Section will focus on two related issues in the Ninth Circuit’s withdrawn 2006 decision: (1) the UNCLOS claim and (2) the amount of deference that courts should give to the SOI in deciding the political question, act of state, and international comity defenses.

*1. UNCLOS*

First, the Ninth Circuit’s withdrawn 2006 decision affirmed the district court’s conclusion that the UNCLOS claim could provide a basis for an ATS claim because ratification of the Convention by 149 nations was sufficient to make UNCLOS part of customary international law.<sup>354</sup> Similarly, both *Sosa* and *Filartiga* treated provisions of the U.N. Charter and the Universal Declaration of Human Rights as evidence of customary international law even though neither is

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<sup>351</sup> *Sarei I*, 221 F. Supp. 2d at 1184–89.

<sup>352</sup> *Sarei II*, 456 F.3d 1069, 1074 (9th Cir. 2006), *aff’d in part, vacated in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007).

<sup>353</sup> *Sarei II*, 456 F.3d at 1077.

<sup>354</sup> *Id.* at 1078. *But see* John Knox, *Case of the Month: Sarei v. Rio Tinto*, *Opinio Juris*, Sept. 1, 2006, <http://www.opiniojuris.org/posts/1157061441.shtml> (“[T]here is no rule whereby treaties are magically converted to customary international law upon reaching 149 parties.”); Michalski, *supra* note 93, at 752 (same). The Ninth Circuit also affirmed the district court’s determination that the plaintiffs’ war crimes, violations of the law of wars, and racial discrimination allegations presented cognizable ATS claims, although those issues are beyond the scope of this Article. *Sarei II*, 456 F.3d at 1078.

self-executing or directly binding.<sup>355</sup> The Ninth Circuit, however, agreed with the district court that the act of state doctrine was a possible defense because there was insufficient evidence that UNCLOS's norms were jus cogens norms that no state may violate.<sup>356</sup> The Ninth Circuit implicitly recognized that prior cases such as *Sosa* and *Filartiga* had limited jus cogens norms to serious human rights abuses such as torture and that no case had yet treated environmental harms as jus cogens norms.<sup>357</sup>

A major weakness of the Ninth Circuit's withdrawn 2006 decision is that the court never addressed *Sosa*'s specific test that rights under modern international law may provide the basis for ATS suits only if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."<sup>358</sup> The Ninth Circuit never explicitly addressed whether UNCLOS violations are comparable to eighteenth-century violations such as piracy. The court of appeals implicitly addressed the widely accepted prong of the test stating that UNCLOS had been ratified by most nations and that the United States had recognized the Convention's baseline provisions as reflecting customary international law.<sup>359</sup> The Ninth Circuit, however, failed to address whether the UNCLOS marine pollution provisions relied upon by the plaintiffs have a definite and specific content comparable to eighteenth century norms such as piracy, which Part VI.C will address in detail.

## 2. *The Statement of Interest*

Second, the Ninth Circuit reversed the district court's dismissal of all claims in the case as nonjusticiable political questions, including the UNCLOS claim,

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<sup>355</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 n.23 (2004) (observing Universal Declaration of Human Rights "has nevertheless had substantial indirect effect on international law"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (1980). The *Filartiga* court explained that the United Nations Charter's prohibition against torture

has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, 'no one shall be subjected to torture.' The General Assembly has declared that the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.' G.A.Res. 2625 (XXV) (Oct. 24, 1970).

*Id.* (footnote omitted); see also IAN BROWLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (Oxford Univ. Press, USA, 6th ed. 2003) (calling the Declaration a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers"); Stephens, *supra* note 74, at 552.

<sup>356</sup> *Sarei II*, 456 F.3d at 1085–86.

<sup>357</sup> See *id.*

<sup>358</sup> *Sosa*, 542 U.S. at 725.

<sup>359</sup> *Sarei II*, 456 F.3d at 1078.

because the court of appeals concluded that the district court had applied the doctrine improperly by giving too much deference to the SOI.<sup>360</sup> Specifically, the Ninth Circuit's withdrawn 2006 decision concluded or suggested that the district court gave too much weight and deference to the SOI in deciding the political question, act of state, and international comity motions to dismiss. The court's orders to the district court, however, varied somewhat for each of these three separate and unique defenses because the weight given to the SOI is different for each doctrine. Additionally, the Ninth Circuit vacated the district court's dismissal of the UNCLOS claim on act of state grounds and remanded the case to the district court for reconsideration of the SOI because the court of appeals concluded that the district court had relied too heavily upon the State Department's SOI to justify the dismissal of the case.<sup>361</sup> Finally, although finding that the district court's dismissal of the UNCLOS claims on international comity grounds was within its discretion, the Ninth Circuit nevertheless vacated the comity portion of the decision so the district court could reconsider the comity grounds in light of the Ninth Circuit's rejection of the lower court's overreliance on the State Department's SOI.<sup>362</sup> Also, the Ninth Circuit directed the district court to consider any new factual information about whether the Papua New Guinea government's past opposition to the suit had changed.<sup>363</sup>

### 3. *Exhaustion of Foreign Remedies*

Moreover, the Ninth Circuit's withdrawn 2006 decision affirmed the district court's conclusion that the ATS does not contain a requirement that the plaintiffs exhaust any local remedies in Papua New Guinea before suing in a United States federal court.<sup>364</sup> Interestingly, in a footnote, the Supreme Court in *Sosa* observed that the European Commission in an *amicus curiae* brief had argued that international law requires a claimant to exhaust its remedies in local courts before seeking an ATS remedy in American courts and commented that the Court "would certainly consider this requirement in an appropriate case."<sup>365</sup> Yet, the Ninth Circuit in *Sarei II* noted that neither the Court nor any courts of appeals had resolved the exhaustion issue and that its circuit precedent had not required exhaustion in ATS cases.<sup>366</sup> Thus, the Ninth Circuit concluded that it would not impose an exhaustion requirement on plaintiffs because the ATS contains no

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<sup>360</sup> *Sarei II*, 456 F.3d at 1079–84; see Baxter, *supra* note 230, at 837.

<sup>361</sup> *Sarei II*, 456 F.3d at 1085–86. The Ninth Circuit reversed the district court's dismissal on act of state grounds because the court of appeals concluded that the prohibition against racial discrimination is a jus cogens norm that can never be justified under the act of state doctrine because international law does not allow acts of racial discrimination to be characterized as official acts of a state. *Id.* at 1085.

<sup>362</sup> *Id.* at 1086–88.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 1089–99.

<sup>365</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

<sup>366</sup> *Sarei II*, 456 F.3d at 1089–90.

explicit exhaustion requirement, unlike the 1991 Torture Victim Protection Act,<sup>367</sup> which does contain an explicit exhaustion requirement.<sup>368</sup> In his dissenting opinion, Judge Bybee argued that the ATS and general principles of international law required plaintiffs to exhaust any local remedies in Papua New Guinea before suing in federal court.<sup>369</sup>

#### 4. *The Political Question Doctrine*

The district court had relied heavily upon the SOI in deciding that it should dismiss all claims as nonjusticiable political questions under the fourth and sixth *Baker* factors.<sup>370</sup> In reviewing whether the district court had given appropriate weight to the SOI, the Ninth Circuit's withdrawn 2006 decision reviewed other courts' treatment of SOIs to determine how much weight should be given to the SOI in the *Sarei* case.<sup>371</sup> The Ninth Circuit observed that several courts of appeals had given respect and deference to SOIs, but these courts had not treated the statements as conclusive in determining whether a court would take jurisdiction in a particular case.<sup>372</sup> In *Sosa*, the Supreme Court had stated that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."<sup>373</sup> Although some courts had "found a nonjusticiable political question where the State Department had indicated that a judicial decision would impinge upon important foreign policy interests," the Ninth Circuit concluded that it would give "serious weight" to the SOI, but would not treat the statement as "controlling on [its] determination of whether the fourth through sixth *Baker* factors are present."<sup>374</sup> The *Sarei* court explained, "[u]ltimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding."<sup>375</sup>

Applying the "serious weight" standard for evaluating SOIs, the Ninth Circuit concluded that, although it was a close question, the SOI in this case did not establish any of the final three *Baker* factors, which require that the case be

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<sup>367</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

<sup>368</sup> *Sarei II*, 456 F.3d at 1090–95, 1098–99.

<sup>369</sup> *Id.* at 1100–22.

<sup>370</sup> *Id.* at 1080; *supra* notes 346–49 and accompanying text.

<sup>371</sup> *Sarei II*, 456 F.3d at 1080–81.

<sup>372</sup> *Id.*; see Baxter, *supra* note 230, at 836.

<sup>373</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

<sup>374</sup> *Sarei II*, 456 F.3d at 1081. The fourth, fifth, and sixth *Baker* factors are: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>375</sup> *Sarei II*, 456 F.3d at 1081.

dismissed only if those factors are “inextricable from the case.”<sup>376</sup> The SOI had raised concerns that adjudication of the case “would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations.”<sup>377</sup> The statement also noted the strong objections of the Papua New Guinea government and observed that “[c]ountries participating in the multilateral peace process have raised this concern” as well.<sup>378</sup> Because there was little other evidence suggesting that the case should be dismissed under the political question doctrine, the Ninth Circuit observed that the SOI “must carry the primary burden of establishing a political question.”<sup>379</sup> In many other cases where courts had dismissed litigation pursuant to the doctrine, the *Sarei II* court noted that there were independent reasons for finding that adjudicating the claims would interfere with executive prerogatives without considering an SOI.<sup>380</sup> Because the United States has had little involvement with the civil war in Bougainville, the Ninth Circuit concluded that there would be little reason to dismiss the case absent the SOI.<sup>381</sup>

After giving the SOI “serious weight,” the *Sarei II* court concluded that a political question was not presented in the case. The Ninth Circuit’s withdrawn 2006 decision determined that “[e]ven if the continued adjudication of this case does present some risk to the Bougainville peace process, that is not sufficient to implicate the final three *Baker* factors.”<sup>382</sup> The *Sarei II* court characterized the final three *Baker* factors as requiring a court to find that it would be “impossibl[e]” to adjudicate the case “without expressing lack of the respect due coordinate branches of government,” “an unusual need for unquestioning adherence to a political decision already made,” or “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>383</sup> The Ninth Circuit observed that the State Department had not explicitly asked the district court to dismiss the case on political question grounds and therefore the court concluded that the adjudication of the suit would not express lack of respect for the executive branch.<sup>384</sup> Additionally, the *Sarei II* court did not find any “unusual need for unquestioning adherence” to the SOI.<sup>385</sup> Finally, because the SOI expressed its

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<sup>376</sup> *Id.* (quoting *Baker*, 369 U.S. at 217).

<sup>377</sup> *Sarei II*, 456 F.3d at 1082 n.10.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 1082.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>384</sup> *Sarei II*, 456 F.3d at 1082. The SOI did observe that the district court had not invited the State Department to address whether the case should be dismissed on political question grounds. *Id.* at 1081–82. In a footnote, the court observed that “[w]e need not determine whether a refusal to honor an explicit request to dismiss would constitute sufficient ‘disrespect’ to warrant dismissal under this factor, although we note the Second Circuit’s conclusion in *Kadic* that it would not.” *Id.* at 1082 n.12.

<sup>385</sup> *Id.* at 1082.



views in a “guarded” manner, the Ninth Circuit concluded that there would be no “embarrassment” to the State Department if the court made an independent determination of whether the case should proceed.<sup>386</sup> Similarly, in *Doe v. Exxon Mobil Corp.*, the D.C. Circuit recently agreed with *Sarei II*’s approach to SOIs and the political question doctrine.<sup>387</sup>

Accordingly, applying the “serious weight” standard from *Sosa*, the Ninth Circuit’s withdrawn 2006 decision determined that it would be inappropriate to uphold the district court’s dismissal of the case “solely on the basis of the SOI.”<sup>388</sup> With little evidence other than the SOI supporting dismissal, the Ninth Circuit held that none of the plaintiffs’ claims presented nonjusticiable political questions and therefore reversed the district court’s dismissal pursuant to that doctrine.<sup>389</sup> Additionally, in a footnote, the court of appeals suggested that the SOI’s concerns about the impact of the litigation on American foreign policy would be cast into doubt if plaintiffs’ allegations that the Papua New Guinea government no longer opposed the suit were “authenticated” by the district court on remand.<sup>390</sup>

##### 5. Act of State Doctrine

The district court dismissed the UNCLOS claims under the act of state doctrine, which prohibits American courts from adjudicating the “validity of the public acts of a recognized sovereign power committed within its own territory.”<sup>391</sup> The Ninth Circuit’s withdrawn 2006 decision agreed with the district court’s conclusion that Papua New Guinea’s actions under the Copper Act to exploit its mineral resources are “public acts of the sovereign.”<sup>392</sup> Additionally, the court of appeals agreed with the district court that while UNCLOS was part of customary international law, the plaintiffs had failed to prove that UNCLOS norms were jus cogens norms than no state may violate.<sup>393</sup> The Ninth Circuit observed that “although the UNCLOS codifies norms of customary international law . . . it is not yet clear whether ‘the international community recognizes the norm[s]’ as jus

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<sup>386</sup> *Id.*

<sup>387</sup> 473 F.3d 345, 354–55 (D.C. Cir. 2007) (discussing *Sarei*’s approach to political question doctrine with approval). *But see id.* at 366–67 (Kavanaugh, J., dissenting) (distinguishing and disagreeing with Ninth Circuit’s refusal in *Sarei* to defer to State Department’s Statement of Interest and arguing District Court in *Sarei* properly deferred to SOI).

<sup>388</sup> *Sarei II*, 456 F.3d at 1082–83.

<sup>389</sup> *Id.* at 1083–84.

<sup>390</sup> *Id.* at 1076–77 (acknowledging plaintiffs’ allegations that the Papua New Guinea government no longer opposes suit); *id.* at 1083 n.13 (observing that plaintiffs’ claim that the Papua New Guinea government no longer opposes suit must be “authenticated,” but if true would cast doubts on conclusion in SOI).

<sup>391</sup> *Id.* at 1084–85.

<sup>392</sup> *Id.* at 1085 (citation omitted).

<sup>393</sup> *Id.* at 1085–86.

cogens norms that may not be violated by a State.<sup>394</sup> Accordingly, the court of appeals concluded that even though UNCLOS violations are violations of international law, “the UNCLOS provisions at issue do not yet have a status that would prevent Papua New Guinea’s acts from simultaneously constituting official sovereign acts.”<sup>395</sup> Furthermore, the Ninth Circuit agreed with the district court’s determination that the adjudication of the UNCLOS claim would have required the court to judge the validity of Papua New Guinea’s official actions in regulating the defendants’ mining operations.<sup>396</sup>

If a rule of customary international law has not yet obtained *jus cogens* status, a court applies the *Sabbatino* factors as a balancing test in determining whether the act of state doctrine bars consideration of the case.<sup>397</sup> In addition, a court in an ATS case should consider whether the alleged violation of customary international law meets the *Sosa* standard of having a widespread acceptance and definite content comparable to claims recognized in 1789 and not apply the act of state doctrine if the claim meets the *Sosa* standard.<sup>398</sup> A principle of customary international law that meets *Sosa*’s standard is consistent with the spirit of *Sabbatino*’s principle that courts should not apply the act of state doctrine if the claim involves “other unambiguous agreement regarding controlling legal principles.”<sup>399</sup>

The court of appeals’ withdrawn 2006 decision next reviewed whether the district court appropriately applied the *Sabbatino* factors in deciding that the act of state doctrine barred any further consideration of the UNCLOS claim.<sup>400</sup> The Ninth Circuit observed that “the district court’s application of the *Sabbatino* factors relied in part on the SOI’s assertion” that continued litigation of the case would harm American relations with Papua New Guinea.<sup>401</sup> Since it had rejected the district court’s application of the SOI in addressing the political question doctrine and the district court had relied heavily on the SOI in dismissing the UNCLOS claim under the act of state doctrine, the court of appeals considered it “prudent” to vacate the district court’s dismissal of the UNCLOS claim pursuant to the act of state doctrine for reconsideration in view of the Ninth Circuit’s analysis and discussion of the SOI.<sup>402</sup> The court of appeals acknowledged, however, that the act of state analysis was not identical to the political question analysis.<sup>403</sup> The Ninth Circuit suggested that the SOI was less of a factor in applying the act of state analysis than the political question analysis because foreign policy was only one of several *Sabbatino* factors, and thus foreign relations played a smaller role than in

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<sup>394</sup> *Id.* (alteration in original) (internal quotation marks omitted).

<sup>395</sup> *Id.* at 1086.

<sup>396</sup> *Id.*

<sup>397</sup> See Holt, *supra* note 41, at 489–90.

<sup>398</sup> See *id.* at 480–90; Knox, *supra* note 354.

<sup>399</sup> Holt, *supra* note 41 at 481 (quoting *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 428 (1964)).

<sup>400</sup> *Sarei II*, 456 F.3d at 1086.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

the *Baker* factors for the political question doctrine.<sup>404</sup> Additionally, the court of appeals encouraged the district court to consider the plaintiffs' claim that the Papua New Guinea government had changed since the lower court's decision and therefore whether the government which had perpetrated the challenged act of state was still in existence.<sup>405</sup>

#### 6. *International Comity*

The district court also dismissed the plaintiffs' UNCLOS claims under the international comity doctrine, which is a discretionary doctrine allowing courts to decline jurisdiction over issues that affect the laws and interests of a foreign nation and may be better adjudicated in that nation's courts.<sup>406</sup> The Ninth Circuit's withdrawn 2006 decision agreed with the district court in assuming that a true conflict between a foreign law and the exercise of American jurisdiction is required before a court may invoke the comity doctrine.<sup>407</sup> The court of appeals concluded that the district court's determination—that Papua New Guinea's Compensation Act, which requires all mining compensation claims to be litigated in Papua New Guinea courts, conflicted with adjudication of the case—was “not an abuse of discretion.”<sup>408</sup>

The Ninth Circuit's withdrawn 2006 decision determined that the district court had acted within its discretion in dismissing the UNCLOS claim on international comity grounds, but it vacated the lower court's comity ruling for reconsideration in light of the court of appeal's analysis of the SOI.<sup>409</sup> As it had with the district court's dismissal of the UNCLOS claim pursuant to the act of state doctrine, the Ninth Circuit stated that it was “prudent” for the district court to reconsider its reliance on the SOI in the comity context because the court of appeals had rejected the district court's reliance on the SOI in its political question doctrine analysis.<sup>410</sup> Additionally, the Ninth Circuit suggested that the district court reconsider its application of the Restatement factors in light of factual developments since its initial decision.<sup>411</sup> The court of appeals did not explain which factual developments might be relevant so it is not possible to be certain whether these factual developments apply to the UNCLOS claim, the racial discrimination claim, or both. On remand, if the district court finds that the plaintiffs' allegations that the Papua New Guinea government no longer opposes the litigation, but instead prefers that the case be decided in American courts are true, then the district court might find that the comity doctrine no longer requires

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<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 1086–87. The district court also dismissed the racial discrimination claim on comity grounds, but that issue is beyond the scope of this Article. *Id.* at 1087.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 1087–88.

<sup>409</sup> *Id.* at 1088–89.

<sup>410</sup> *Id.* at 1088.

<sup>411</sup> *Id.*

the dismissal of the UNCLOS or racial discrimination claims.<sup>412</sup>

### *C. The Ninth Circuit's 2007 Decision*

The Ninth Circuit's 2007 decision reached essentially the same conclusion and order as its prior withdrawn decision. The Ninth Circuit reversed the district court's dismissal of all claims as nonjusticiable political questions. It reversed the district court's dismissal of the racial discrimination claim on act of state grounds, and vacated the district court's dismissal of the racial discrimination claim on comity grounds and remanded its dismissal of the UNCLOS claims on act of state and comity grounds, for reconsideration in light of its opinion.<sup>413</sup> The 2007 decision, however, avoided the thorny question of whether the plaintiffs' substantive claims were cognizable on the merits by concluding that the allegations were sufficiently serious to warrant the exercise of federal jurisdiction and then sending the case back to the district court.<sup>414</sup>

#### *1. Jurisdiction*

In deciding whether the court had subject matter jurisdiction under the ATS, the Ninth Circuit relied on its precedent establishing that "a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous."<sup>415</sup> Because the plaintiffs alleged several claims asserting jus cogens violations including allegations of war crimes, crimes against humanity, and racial discrimination, the court easily found that the claims were not frivolous.<sup>416</sup> It is significant that the court did not list the UNCLOS claim among the potential jus cogens violations and later stated that it was "not yet clear" whether UNCLOS's norms are jus cogens norms from which no derogation is allowed.<sup>417</sup> Because the plaintiffs had raised serious, nonfrivolous claims, the Ninth Circuit concluded "we need not and do not decide whether plaintiffs' substantive claims and theories of vicarious liability constitute valid ATCA claims after *Sosa*."<sup>418</sup> The court then turned to questions of justiciability, which this Article will briefly discuss, and of exhaustion, an issue which is beyond the scope of this Article other than to observe that the discussion of the issue is identical in the 2006 and 2007 opinions.<sup>419</sup>

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<sup>412</sup> See *supra* note 390.

<sup>413</sup> *Sarei III*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh'g granted*, 499 F.3d 923 (9th Cir. 2007). See *infra* Part V.C.2.

<sup>414</sup> *Sarei III*, at 1201–03.

<sup>415</sup> *Id.* at 1200 (quoting *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 734 (9th Cir. 1979)).

<sup>416</sup> *Sarei III*, 487 F.3d at 1202–03.

<sup>417</sup> *Id.* at 1202, 1210.

<sup>418</sup> *Id.* at 1203.

<sup>419</sup> Compare *Sarei III*, 487 F.3d at 1203–23, with *Sarei II*, 456 F.3d 1069, 1079–99 (9th Cir. 2006).

## 2. *Justiciability*

In “hold[ing] that none of the plaintiffs’ claims present nonjusticiable political questions” and in reversing the district court’s dismissal on that ground, the 2007 opinion essentially copied its discussion of that issue in the 2006 opinion.<sup>420</sup> The 2007 opinion adopted the same approach as the withdrawn 2006 opinion in concluding that *Sosa*’s “serious weight” standard did not require courts to give conclusive weight to the State Department’s interests, and that the district court had erred in giving essentially conclusive weight to the SOI.<sup>421</sup> In reversing the district court’s dismissal of the alleged racial discrimination claim on act of state grounds, the 2007 decision copied the 2006 opinion in concluding that acts of racial discrimination are violations of jus cogens norms that cannot constitute official sovereign acts.<sup>422</sup> In vacating the district court’s dismissal of the alleged UNCLOS violations on act of state grounds, the 2007 opinion made one significant change to the 2006 opinion. The 2006 opinion had concluded that UNCLOS constituted customary international law, but the 2007 opinion did not reach the issue on the merits and simply treated the issue as sufficiently important to justify remanding the question to the district court for a reconsideration of the dismissal in light of the Ninth Circuit’s analysis of the SOI.<sup>423</sup> In vacating the district court’s dismissal of the racial discrimination claims and the UNCLOS claims on international comity grounds for reconsideration in light of its analysis of the SOI, the 2007 opinion used the same language as the 2006 opinion.<sup>424</sup>

## 3. *Why Did the Panel Majority Withdraw its 2006 Decision?*

The 2007 opinion does not address why the panel majority withdrew its 2006 decision and issued its 2007 opinion. It is possible to make some guesses about why the majority withdrew the 2006 opinion and issued the revised opinion. The 2007 opinion reached the same holdings and order to the district court as the withdrawn 2006 opinion, so there was no reason to withdraw the 2006 for reasons relating to the ultimate remand and order to the district court. The discussion of justiciability and exhaustion are largely the same in both opinions except that the act of state section in the 2007 opinion does not decide whether the UNCLOS claim constituted customary international law.<sup>425</sup> Yet, the most important difference is that the 2007 opinion avoided the contentious question of whether the plaintiffs’ claims, especially the UNCLOS claims, were cognizable under the ATS by simply finding that the claims were serious enough to warrant jurisdiction and

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<sup>420</sup> Compare *Sarei III*, 487 F.3d at 1208, with *Sarei II*, 456 F.3d at 1084.

<sup>421</sup> Compare *Sarei III*, 487 F.3d at 1207, with *Sarei II*, 456 F.3d at 1082–83.

<sup>422</sup> Compare *Sarei III*, 487 F.3d at 1209–10, with *Sarei II*, 456 F.3d at 1086.

<sup>423</sup> Compare *Sarei III*, 487 F.3d at 1210, with *Sarei II*, 456 F.3d at 1085–86.

<sup>424</sup> Compare *Sarei III*, 487 F.3d at 1213, with *Sarei II*, 456 F.3d at 1089.

<sup>425</sup> Compare *Sarei III*, 487 F.3d at 1210, with *Sarei II*, 456 F.3d at 1085–86.

review by the district court.<sup>426</sup>

It seems likely that the majority sought to avoid addressing the merits of whether at least some of the plaintiffs' claims constituted customary international law that is cognizable under the ATS. Interestingly, the court explicitly stated that "[p]laintiffs here have alleged several claims asserting jus cogens violations that form the least controversial core of modern day ATCA jurisdiction, including allegations of war crimes, crimes against humanity and racial discrimination."<sup>427</sup> The only claim that does not clearly violate a jus cogens norm is the UNCLOS claim.<sup>428</sup> It is possible that the majority withdrew the 2006 opinion because they believed that their conclusion in that opinion that UNCLOS constituted customary international law was controversial and might result in the Ninth Circuit granting the defendants' petition for en banc review.

## VI. FUTURE ENVIRONMENTAL CLAIMS AFTER *SOSA*

Although *Sosa* could have provided a clearer standard for which modern human rights norms are comparable to eighteenth-century norms such as piracy, most environmental law norms are too indefinite to meet even a broad reading of *Sosa*'s requirement that modern international law principles must have a definite content comparable to eighteenth-century norms to be the basis for an ATS suit. In light of *Sosa*'s caution about allowing too many ATS suits, lower courts should generally allow ATS claims alleging serious human rights violations and reject purely environmental claims.<sup>429</sup> Courts could, however, consider claims where alleged human rights abuses are intertwined with the alleged environmental harms.<sup>430</sup>

### A. Internal Pollution Claims

ATS claims that allege pollution in only the source country are unlikely to succeed unless there are allegations that the defendant intended to cause harm or that the human rights abuses are intertwined with the pollution activities. Courts have been reluctant to accept ATS claims based on allegations of internal pollution

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<sup>426</sup> *Sarei III*, 487 F.3d at 1223.

<sup>427</sup> *Id.* at 1202.

<sup>428</sup> *Id.* at 1210.

<sup>429</sup> One commentator has argued that even human rights offenses are too vague compared to piracy's "narrow and precise definition." Kontorovich, *supra* note 201, at 156. The problem with that argument is that *Sosa* favorably cited *Filartiga*, Judge Edwards' concurrence in *Tel-Oren*, and the *Marcos* litigation as examples of appropriate ATS cases and those cases all involved alleged human rights abuses. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

<sup>430</sup> See Boeving, *supra* note 25, at 134 ("[I]t seems doubtful that purely environmental damage will become part of the law of nations anytime soon. Therefore, [the *Sosa*] decision signals to environmental plaintiffs that the human rights proxy approach is the most viable alternative and perhaps only route through which to pursue their claims.").

because international law, including the Stockholm and Rio Declarations, recognizes that nations have a right to exploit their own natural resources following their particular environmental policies.<sup>431</sup> Courts have emphasized that American pollution standards cannot serve as the measure for what level of pollution is acceptable in other countries.<sup>432</sup> Courts have rejected environmental ATS claims based on broad assertions that there is a fundamental international human “right to health,” right to “sustainable development,” or right to live in a clean and healthy environment, because there are no real limits or boundaries to such assertions.<sup>433</sup>

If a plaintiff alleges that a defendant released environmental pollution with the deliberate purpose of causing serious harms to the plaintiff then courts should address that claim as a serious human rights violation comparable to genocide, crimes against humanity, or war crimes.<sup>434</sup> The district court in *Beanal I* suggested that extreme environmental injuries might constitute genocide if the defendant specifically intended to cause such destruction, but concluded that the plaintiff’s vague allegations that the environmental harms constituted “cultural genocide” were insufficient and that the plaintiff had failed to allege that the defendant had caused the pollution with the specific purpose of destroying the Amungme group.<sup>435</sup> In a case similar to Saddam Hussein’s intentional destruction of oil wells in Kuwait that caused extensive fires and large-scale environmental devastation, a court might recognize a valid ATS claim for genocide, crimes against humanity, or war crimes, depending upon the defendant’s motives, whether the incident occurred during a war or civil war, and the number of people harmed or killed by the incident.<sup>436</sup>

For example, the Second Circuit in *Flores II* rejected a claim alleging that “egregious” intra-national pollution from the mining activities violated customary international environmental law because intra-national pollution, even if severe, is generally a concern of that particular nation alone and not a “mutual concern” of the international community at large.<sup>437</sup> Similarly, the Fifth Circuit in *Beanal III*

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<sup>431</sup> Rio Declaration, *supra* note 131, princ. 2 (stating nations have the “sovereign right to exploit their own resources pursuant to their own environmental and developmental policies”); Stockholm Declaration, *supra* note 104, princ. 21 (granting nations the “sovereign right to exploit their own resources pursuant to their own environmental policies”).

<sup>432</sup> See *supra* notes 146, 168–169 and accompanying text.

<sup>433</sup> See *supra* notes 150–160, 165–167, 268–275 and accompanying text.

<sup>434</sup> Christensen, *supra* note 43, at 1252 (“Environmental abuses may be actionable, however, under the theory that they were committed in furtherance of genocide, war crimes, or crimes against humanity.”).

<sup>435</sup> *Beanal I*, 969 F. Supp. 362, 372–73 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999).

<sup>436</sup> See *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 130 (E.D.N.Y. 2005) (discussing Saddam Hussein’s destruction of Kuwaiti oil wells as example of a violation of customary international law); see also Edgerton, *supra* note 258 (discussing whether Saddam Hussein’s destruction of Kuwaiti oil wells violated international law).

<sup>437</sup> *Flores II*, 414 F.3d 233, 248–66 (2d Cir. 2003).

suggested that U.S. courts should not become involved in internal pollution issues because Principle 2 of the Rio Declaration contradicts such claims by recognizing that States have the “sovereign right to exploit their own resources pursuant to their own environmental and developmental policies.”<sup>438</sup> Thus, courts should generally reject internal pollution allegations as being sufficient to bring an ATS action.

### *B. Transboundary Pollution Claims as Customary International Law*

Customary international law prohibits transboundary pollution that causes significant harm to other nations.<sup>439</sup> The Restatement (Third) concludes that a State is obliged to “take all necessary measures, to the extent possible, to prevent activities within its jurisdiction or control from causing significant injury to the environment outside its jurisdiction.”<sup>440</sup> The Restatement (Third) also codifies the State’s responsibility “for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.”<sup>441</sup>

Even if there is a customary international law norm against harmful transboundary pollution, existing transboundary liability and compensation principles are too vague to meet *Sosa*’s definiteness standard for ATS suits.<sup>442</sup> For example, it is not clear whether traditional negligence or emerging strict liability principles of liability govern, and both standards require subjective judgments about which harms are “significant” enough to require compensation.<sup>443</sup> International courts or arbitration panels are better equipped to address the vague principles concerning transboundary liability than are federal courts.

<sup>438</sup> *Beanal III*, 197 F.3d at 167 n.6.

<sup>439</sup> Abadie, *supra* note 90, at 775–78.

<sup>440</sup> *Developments in the Law—International Environmental Law*, 104 Harv. L. Rev. 1492, 1497 (1991) [hereinafter *Developments in the Law*]; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601–604 & introductory note (1987).

<sup>441</sup> Section 601(1) of the Restatement (Third) states:

A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

- (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
- (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 601.

<sup>442</sup> See *Developments in the Law*, *supra* note 440, at 1508 (“The nuisance-like standard of the *sic utere* principle cannot a priori answer the crucial question of what level of environmental damage constitutes *unacceptable* damage, nor can it sufficiently describe what exercise of a state’s rights causes unacceptable harm.” (footnotes omitted)).

<sup>443</sup> *Id.* at 1509–11.



Looking more closely at the issue, there are two types of transboundary pollution. First, pollution from any location may harm the global commons, including ocean pollution, ozone depletion, and global warming.<sup>444</sup> Second, pollution from a source country may affect a receiving country's territory.<sup>445</sup> Both types of transboundary pollution in theory could violate customary international law or an MEA and thus either type could be actionable under the ATS.<sup>446</sup> Still, both types of transboundary pollution claims raise too many questions unanswered by existing international law to be the basis for an ATS suit.

A number of MEAs recognize that there is an international law norm against transboundary pollution that causes significant environmental harm and this norm is now a part of customary international law. Principle 21 of the 1972 Stockholm Declaration of Principles grants nations the "sovereign right to exploit their own resources pursuant to their own environmental policies," but also imposes upon them "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."<sup>447</sup> Principle 21 was adopted by a vote of 103 to 0, including the United States, with twelve abstentions by Soviet bloc nations and South Africa.<sup>448</sup> The Stockholm Declaration is not binding upon its signatories, but Principle 21's requirement that States have a responsibility to avoid transboundary pollution is now widely accepted as reflecting customary international law.<sup>449</sup> Principle 2 of the 1992 Rio Declaration adopted identical language in proscribing transboundary harms.<sup>450</sup>

Stockholm Principle 22, however, weakened the responsibility requirement in Principle 21 by simply requiring that States "co-operate to develop further the international law regarding liability and compensation."<sup>451</sup> Using somewhat stronger language than Stockholm Principle 22, Rio Principle 13 requires States to "cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of

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<sup>444</sup> See Abadie, *supra* note 90, at 775 n.186; Alan Neff, *Not In Their Backyards Either: A Proposal for a Foreign Environmental Practices Act*, 17 *ECOLOGY L.Q.* 477, 480 (1990).

<sup>445</sup> See Abadie, *supra* note 90, at 775 n.186; Neff, *supra* note 444, at 480.

<sup>446</sup> See Abadie, *supra* note 90, at 775 n.186.

<sup>447</sup> Stockholm Declaration, *supra* note 104, princ. 21.

<sup>448</sup> Abadie, *supra* note 90, at 778; see Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 *HARV. INT'L L.J.* 423, 433 (1973).

<sup>449</sup> Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach To Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 *B.C. ENVTL. AFF. L. REV.* 447, 457 (1995); *Developments in the Law*, *supra* note 440, at 1497-98.

<sup>450</sup> Rio Declaration, *supra* note 131, princ. 2.

<sup>451</sup> Stockholm Declaration, *supra* note 104, princ. 22 ("States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."); see *Developments in the Law*, *supra* note 440, at 1508.

environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”<sup>452</sup> As is discussed below, the United Nations International Law Commission has produced eight draft principles concerning transboundary liability, but the majority of nations have yet to endorse these principles and the principles are relatively vague.<sup>453</sup> Even if Principle 21 is customary international law, there is a strong argument that it is too indefinite to enforce in an ATS suit because there is no clear or universally accepted definition of how much harm is necessary for an actionable violation or how to measure damages.<sup>454</sup>

Several international court decisions or adjudications support the view that customary international law now requires an offending nation to compensate its neighbors for harms caused by transboundary pollution.<sup>455</sup> The 1938 and 1941 *Trail Smelter Arbitration* between the United States and Canada held Canada liable for compensation to the United States for transboundary sulfur dioxide pollution from a smelter in British Columbia that traveled into the United States and damaged apple growers in Washington State.<sup>456</sup> Based upon both international law and U.S. law, the 1941 arbitration panel concluded by issuing injunctive relief,

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>457</sup>

Although the arbitration was only binding between the two parties and technically had no precedential value,<sup>458</sup> the *Trail Smelter* decision’s principle that States are liable for their transboundary pollution is now recognized as customary

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<sup>452</sup> Rio Declaration, *supra* note 126, princ. 13. Rio Principle 13 further requires States to

develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

*Id.*

<sup>453</sup> See *infra* notes 473–475 and accompanying text.

<sup>454</sup> See *supra* note 106 and accompanying text.

<sup>455</sup> See Abadie, *supra* note 90, at 776–77.

<sup>456</sup> The Trail Smelter Case, 1941 (U.S. v. Can.), 3 Rep. Int’l Arb. Awards 1905 (1938) (initial decision awarding damages), *further proceedings*, 3 R. Int’l Arb. Awards 1938 (1941) (final decision issuing injunctive relief); see HUNTER ET AL., *supra* note 65, at 543–50.

<sup>457</sup> *Trail Smelter*, 3 R. Int’l Arb. Awards at 1965 (final decision).

<sup>458</sup> *Developments in the Law*, *supra* note 440, at 1500.

international law. It was the genesis of Principle 21 of the Stockholm Declaration, and has been followed by the International Court of Justice (ICJ).<sup>459</sup> For purposes of an ATS suit, however, *Trail Smelter's* "serious consequence" standard is too vague to meet *Sosa's* definiteness standard.

In the 1949 *Corfu Channel* Case, the ICJ held Albania responsible for damage to British warships from mines it had placed in Albanian waters.<sup>460</sup> The *Corfu Channel* court stated that "every State[]" has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."<sup>461</sup> Additionally, in the 1957 *Lac Lanoux* Arbitration between France and Spain, the arbitration tribunal reaffirmed the *Corfu Channel* principle that a State has an obligation to consider the interests and respect the rights of another State, but the case primarily addressed the parties' treaty obligations regarding water rights.<sup>462</sup> The international community has recognized the *Trail Smelter* arbitration and the *Corfu Channel* case together as establishing a customary law principle of compensation for transboundary harms, but neither case establishes liability principles that are definite enough for an ATS suit.<sup>463</sup>

Two cases involving nuclear weapons possibly suggest that customary international law imposes liability on a State that causes significant environmental harm to other nations, but neither case provides the definite standards needed for an ATS suit. First, in the 1973–74 Nuclear Tests Cases, Australia and New Zealand separately sought to enjoin France from conducting atmospheric nuclear tests in the Pacific Ocean over Mururoa Atoll in French Polynesia, which is several thousands of miles from Australia and New Zealand.<sup>464</sup> Because France agreed to stop atmospheric testing and to use underground testing,<sup>465</sup> the ICJ did not address the legality of the atmospheric testing and dismissed the case as moot.<sup>466</sup> In a

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<sup>459</sup> See HUNTER ET AL., *supra* note 65, at 542, 550 n.3; *Developments in the Law*, *supra* note 440, at 1497 n.30.

<sup>460</sup> See *The Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 22–23 (Apr. 9).

<sup>461</sup> *Id.* at 22.

<sup>462</sup> *Lac Lanoux Arbitration* (Spain v. Fr.), 12 R. Int'l Arb. Awards 281, 314–17 (1957); see Abadie, *supra* note 90, at 777 (stating *Lac Lanoux* reaffirmed the *Corfu Channel* principle that a state has an obligation to consider the interests and respect the rights of another state); *Developments in the Law*, *supra* note 440, at 1500 (arguing the *Lac Lanoux* arbitration tribunal was primarily concerned with interpreting "treaty obligations").

<sup>463</sup> See HUNTER ET AL., *supra* note 65, at 503–04; Edgerton, *supra* note 258, at 162 n.74; Richard E. Levy, *International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System*, 36 KAN. L. REV. 81, 90, 100–01 (1987) (stating holdings of *Trail Smelter* and *Corfu Channel* express general principles of international law); Durwood Zaelke & James Cameron, *Global Warming and Climate Change—An Overview of the International Legal Process*, 5 Am. U. J. Int'l L. & Pol'y 249, 264 (1990) (stating that *Trail Smelter* case expresses principles of customary international law).

<sup>464</sup> Nuclear Tests Cases (Austl. v. Fr.), 1974 I.C.J. 253, 254–56 (Dec. 20); see HUNTER ET AL., *supra* note 65, at 999.

<sup>465</sup> HUNTER ET AL., *supra* note 65, at 999.

<sup>466</sup> After the ICJ dismissed the case as moot, France withdrew from the ICJ's jurisdiction. *Nuclear Tests Cases*, 1974 I.C.J. at 255, 272; see HUNTER ET AL., *supra* note

dissenting opinion, Judge de Castro cited the *Trail Smelter* decision, and stated:

If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequence must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.<sup>467</sup>

While the dissenting opinion has no precedential value in itself, it provides some evidence that *Trail Smelter's* transboundary liability principles are widely followed.

In 1996, the World Health Organization and the United Nations General Assembly asked the ICJ for an advisory opinion regarding whether international law permits the threat or use of nuclear weapons in any circumstances.<sup>468</sup> By an eight to seven vote, the ICJ decided that the threat or use of nuclear weapons was generally contrary to the law of war's rules on armed conflict, but the court did not address whether a State could use such weapons as self-defense if its survival was at stake.<sup>469</sup> The court also determined that existing environmental treaties are not "intended to deprive a State of the exercise of its right of self-defense under international law because of its obligations to protect the environment."<sup>470</sup> The ICJ, however, recognized a general principle of international law prohibiting transboundary environmental harms, stating that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."<sup>471</sup> The ICJ's decisions technically do not create precedent, but they are widely followed by the international community. The ICJ's recognition that States have an obligation to avoid transboundary pollution suggests this principle is now part of customary international law, but the principle is too vague to serve as the basis of an ATS suit under the *Sosa* standard.

Beginning in 1978 and continuing to the present, the United Nations' International Law Commission has appointed special rapporteurs to develop principles for transboundary liability.<sup>472</sup> In June 2006, the Commission adopted a

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65, at 999; Abadie, *supra* note 90, at 777.

<sup>467</sup> See *Nuclear Tests Cases*, 1974 I.C.J. at 389 (de Castro, J., dissenting).

<sup>468</sup> See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); HUNTER ET AL., *supra* note 65, at 1000, 1461–64.

<sup>469</sup> See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 468, ¶¶ 53–58; HUNTER ET AL., *supra* note 65, at 1000 (analyzing whether nuclear weapons should be prohibited).

<sup>470</sup> *Legality of the Threat of Use of Nuclear Weapons*, *supra* note 468, ¶¶ 30, 33; see HUNTER ET AL., *supra* note 65, at 504.

<sup>471</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 468, ¶ 29; see HUNTER ET AL., *supra* note 65, at 504.

<sup>472</sup> Int'l Law Comm'n, Report of the Working Group on Int'l Liab. for Injurious

preamble and a set of eight draft principles on the “allocation of loss in the case of transboundary harm arising out of hazardous activities and in August 2006 adopted commentaries to those same draft principles.”<sup>473</sup> In August 2006, the Commission recommended that the U.N. General Assembly “endorse the draft principles by a resolution and urge States to take national and international action to implement them.”<sup>474</sup> In December 2006, the General Assembly without a vote approved a draft resolution that took note of the eight draft principles, “commends them to the attention of Governments,” and placed them on the provisional agenda for its next session. This formulaic response by the General Assembly is a neutral response that does not constitute an endorsement of the draft principles.<sup>475</sup>

In the Preamble, the draft principles “Reaffirm[]” the liability and compensation norms in Principles 13 and 16<sup>476</sup> of the Rio Declaration.<sup>477</sup> Draft Principle 1 declares that “[t]he present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law.”<sup>478</sup> Principle 2(a) explains that “‘damage’ means significant damage caused to persons, property or the environment.”<sup>479</sup> Principle 2(c) defines “hazardous

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Consequences Arising Out of Acts Not Prohibited by Int’l Law, ¶¶ 51–57, 59, 64–65, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc A61/10 (Supp) (May 1–June 9 & Jul. 3–Aug. 11, 2006) [hereinafter Int’l Liab. Comm’n Report], available at <http://untreaty.un.org/ilc/reports/2006/english/chp5.pdf>; see *Developments in the Law*, *supra* note 440, at 1499 n.42.

<sup>473</sup> Int’l Liab. Comm’n Report, *supra* note 472, ¶¶ 60–61.

<sup>474</sup> *Id.* ¶ 63.

<sup>475</sup> Take note of the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, presented by the Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments. Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, G.A. Res. 61/36, Annex, U.N. Doc. A/Res/61/36/Annex (Dec. 18, 2006). See Press Release, General Assembly, Considering Sixth Committee Reports, Adopts Text on Criminal Accountability of U.N. Officials, Experts on Mission (Dec. 4, 2006), <http://www.un.org/News/Press/docs/2006/ga10544.doc.htm>.

<sup>476</sup> “National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” Rio Declaration, *supra* note 131, princ. 16.

<sup>477</sup> Int’l Liab. Comm’n Report, *supra* note 472, ¶ 66.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.* Principle 2(a) lists the following types of damage:

- (i) loss of life or personal injury;
- (ii) loss of, or damage to, property, including property which forms part of the cultural heritage;
- (iii) loss or damage by impairment of the environment;
- (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;
- (v) the costs of reasonable response measures.

activity” as “an activity which involves a risk of causing significant harm.” Principle 3 defines the compensatory purposes of the draft principles.<sup>480</sup> Principle 4(1) recommends that each State “should” provide compensation to victims of transboundary harm.<sup>481</sup> Principle 4(2) encourages a strict liability regime, declaring that “[t]hese measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault.”<sup>482</sup> Principle 6(1) requires the State causing the transboundary harm to provide domestic judicial and domestic remedies for victims.<sup>483</sup> Principle 7 recommends that States “should” make “all efforts” to develop global, regional or bilateral agreements on transboundary liability and responses.<sup>484</sup> Principle 8 recommends that “[e]ach State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.”<sup>485</sup>

The draft principles are not themselves binding but are suggestive of trends in international law. A key question is whether the draft principles reflect a universal, mandatory, and definite international consensus about providing compensation to victims of transboundary harms. The Commission’s adoption of the draft principles suggests that there could be broad support for these principles, but it will not be known whether that support is universal until the General Assembly votes to accept the principles. From the perspective of an ATS suit, a problem with the draft principles is that they use the hortatory term “should” in several key liability principles rather than the mandatory shall. The use of the term “should” means they are not obligatory and hence are not enforceable in an ATS suit.

Another issue is whether the term “significant damage” is definite enough for an ATS suit. The commentary to Principle 2 states:

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*Id.*

<sup>480</sup> *Id.* princ. 3. Principle 3 defines the compensatory purposes as “(a) to ensure prompt and adequate compensation to victims of transboundary damage; and (b) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.” *Id.*

<sup>481</sup> *Id.* princ. 4(1) (“Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.”).

<sup>482</sup> *Id.* princ. 4(2).

<sup>483</sup> *Id.* princ. 6(1) (“States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.”).

<sup>484</sup> *Id.* princ. 7 (“Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.”).

<sup>485</sup> *Id.* princ. 8(1).

The term “significant” is understood to refer to *something more than “detectable” but need not be at the level of “serious” or “substantial”*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.<sup>486</sup>

The commentary also acknowledges that deciding what is significant damage involves a case-by-case determination.

The determination of “significant damage” involves both factual and objective criteria, and a value determination. The latter is dependent on the circumstances of a particular case and the period in which it is made. For instance, a deprivation which is considered significant in one region may not necessarily be so in another. A certain deprivation at a particular time might not be considered “significant” because scientific knowledge or human appreciation at that specific time might have considered such deprivation tolerable. However, that view might later change and the same deprivation might then be considered significant damage. “For instance, the sensitivity of the international community to air and water pollution levels has been constantly undergoing change.”<sup>487</sup>

The commentary provides an extensive discussion of what constitutes significant transboundary harm and related issues for a total of thirty-four paragraphs.<sup>488</sup> This discussion is comparable to the guidance a U.S. court might find in a statute’s legislative history or an EPA rule, but the commentary fails to provide definite standards because it recognizes that scientific knowledge about the environment is evolving, there are regional differences in how pollution affects the environment, and that many different types of potentially hazardous substances exist.

Even if there is a universal and obligatory duty in customary international law on the part of States to avoid transboundary pollution harming other States or areas, that duty is not sufficiently specific or definable to be enforced through the ATS. According to an environmental law casebook by American scholars, “The duty to prevent transboundary harm is not absolute,” but instead requires States “to use due diligence in taking all practicable steps.”<sup>489</sup> A duty to exercise such “due diligence” is not sufficiently concrete to be enforceable under the ATS. Because of environmental law’s inherent complexities, customary international law prohibiting significant transboundary harm is far less definite than the eighteenth-century customary law that defines the standard in *Sosa*. Accordingly, courts should reject ATS claims alleging transboundary harms.

### C. UNCLOS

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<sup>486</sup> *Id.* princ. 2, cmt. (footnote omitted).

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> HUNTER ET AL., *supra* note 65, at 506 n.5.

### 1. Introduction to UNCLOS Part XII

A weakness of both the district court's decision and the court of appeals' withdrawn 2006 opinion in *Sarei* is that neither opinion addressed UNCLOS' specific provisions. This Section examines UNCLOS' marine pollution provisions in detail. It concludes that they are too indefinite to serve as the basis of an ATS suit.

Beginning in 1973 and concluding in 1982, the Third United Nations Conference on the Law of the Sea sought to update the work of the 1958 Geneva Conference on the Law of the Sea and address emerging topics such as marine pollution that had been given limited attention in the past.<sup>490</sup> UNCLOS III consists of 320 articles divided in seventeen parts and nine annexes.<sup>491</sup> UNCLOS was opened for signature in 1982 and came into force in 1994.<sup>492</sup> As of November 2006, 155 States had ratified UNCLOS.<sup>493</sup> Many scholars believe that because so many nations have ratified it that it now has become customary law that is binding even on those nations that have not signed it, including the United States.<sup>494</sup> Even if it codifies customary international law, UNCLOS marine pollution provisions are too indefinite to be enforceable in an ATS suit.<sup>495</sup> Furthermore, Professor Knox argues that these provisions could not have been customary international law during the 1970s and 1980s when the mine created most of the pollution because UNCLOS had not yet entered into force.<sup>496</sup>

Part XII of UNCLOS addresses marine pollution in Articles 192 through

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<sup>490</sup> See Alan E. Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 AM. J. INT'L L. 347, 347–49 (1985).

<sup>491</sup> HUNTER ET AL., *supra* note 65, at 739; UNCLOS, *supra* note 5.

<sup>492</sup> HUNTER ET AL., *supra* note 65, at 739; International Tribunal for the Law of the Sea, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow “General Information—States Parties” hyperlink) (last visited Sept. 30, 2007) [hereinafter ITLOS].

<sup>493</sup> ITLOS, *supra* note 492.

<sup>494</sup> See, e.g., Mary Gray Davidson, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENVTL. L. REV. 499, 528–29 (2002); Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention*, 15 AM. U. INT'L L. REV. 583, 597 (1999); Suzanne Iudicello & Margaret Lytle, *Marine Biodiversity and International Law: Instruments and Institutions That Can Be Used to Conserve Marine Biological Diversity Internationally*, 8 TUL. ENVTL. L.J. 123, 132 (1994) (“Many experts have agreed that ‘UNCLOS is not only a treaty but a codification and articulation of the present state of the rules applicable to the oceans,’ and, as such, is binding on both signatories and nonsignatories as customary international law.” (quoting John P. Wise, *Federal Conservation and Management of Marine Fisheries in the United States*, Center For Marine Conservation, 1991, at 109–10)).

<sup>495</sup> See generally Knox, *supra* note 354 (suggesting that UNCLOS Articles 194 and 207 are too indefinite to meet the *Sosa* definiteness standard).

<sup>496</sup> Knox, *supra* note 354.



236.<sup>497</sup> Article 192, entitled “General Obligation,” declares that “States have the obligation to protect and preserve the marine environment.”<sup>498</sup> Article 193 recognizes that “States have the sovereign right to exploit their natural resources pursuant to their environmental policies,” but limits that right of exploitation “in accordance with their duty to protect and preserve the marine environment.”<sup>499</sup> The state obligations in Articles 192 and 193 are simply too general and vague to meet *Sosa*’s definite content standard.

Article 206, entitled “Assessment of potential effects of activities,” establishes a vague duty on the part of States to conduct an environmental impact assessment on some proposed activities within their jurisdiction. It declares that “[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment.”<sup>500</sup> Article 206 does not provide any detailed standards to decide the threshold issue of whether a proposed project may involve “substantial pollution of or significant and harmful changes to the marine environment.”<sup>501</sup> Nor does it specify the issues that such an assessment should address.<sup>502</sup> Thus, Article 206 is too general and vague to meet *Sosa*’s definite content standard.

## 2. Article 194: Controlling Marine Pollution and Transboundary Pollution

Article 194 sets forth the general responsibility of States to adopt “[m]easures to prevent, reduce and control pollution of the marine environment.”<sup>503</sup> Specifically, Article 194(1) provides:

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source, using for

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<sup>497</sup> See Boyle, *supra* note 490, at 350 (“[P]art XII of the Convention represent[s] the first attempt to set out a general framework for a legal regime that establishes on a global, conventional basis the obligations, responsibilities and powers of states in all matters of marine environmental protection.”); Jonathan I. Charney, *The Marine Environment and the 1982 United Nations Convention on the Law of the Sea*, 28 INT’L LAW. 879, 883–93 (1994).

<sup>498</sup> UNCLOS, *supra* note 5, art. 192.

<sup>499</sup> *Id.* art. 193; see Charney, *supra* note 497, at 886.

<sup>500</sup> UNCLOS, *supra* note 5, art. 206; see Maki Tanaka, *Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 Mich. J. Int’l L. 337, 356 (2004) (“[A]rticle 206 is quite vague. This provision fails to identify which state should be responsible for assessing the impacts of an activity that falls under concurrent jurisdiction of several states.”).

<sup>501</sup> Tanaka, *supra* note 500, at 393 (quoting UNCLOS, *supra* note 5, art. 206).

<sup>502</sup> See Tanaka, *supra* note 500, at 356.

<sup>503</sup> UNCLOS, *supra* note 5, art. 194 (title of article 194).

this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.<sup>504</sup>

The term “pollution of the marine environment” is defined in Article 1(4).<sup>505</sup>

Article 194(1) declares that States have a duty to take “all measures” to reduce marine pollution, but weakens that requirement by including the two qualifying terms “best practicable means” and “in accordance with their capabilities.”<sup>506</sup> This qualifying language gives States “wide discretion” in deciding how to fulfill their obligations under Article 194.<sup>507</sup> Because it gives States significant discretion in determining their obligation to reduce marine pollution, Article 194 is too indefinite to serve as the basis of an ATS suit.

The “best practicable means” standard is possibly specific enough to enforce in an ATS suit, but the “in accordance with their capabilities” qualification is clearly too indefinite to serve as the basis for an ATS suit. Article 194’s “best practicable means” standard is arguably definite enough for an ATS suit because a plaintiff could introduce expert opinion regarding the best technology for controlling marine pollution. The U.S. Clean Water Act uses a similar “best practicable technology” (BPT) standard for establishing technology standards for regulating water pollution for various industrial categories and subcategories.<sup>508</sup> The Act’s legislative history, however, provided some guidance to the courts and the EPA in defining BPT.<sup>509</sup> On the other hand, because UNCLOS does not

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<sup>504</sup> *Id.* art. 194(1).

<sup>505</sup> *Id.* art. 1(4). Article 1(4) defines “pollution of the marine environment as

the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

*Id.*

<sup>506</sup> *Id.* art. 194(1).

<sup>507</sup> Dr. Daud Hassan, *International Conventions Relating to Land-Based Sources of Marine Pollution Control: Applications and Shortcomings*, 16 GEO INT’L ENVTL. L. REV. 657, 670 (2004); accord William C. G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 INT’L J. SUSTAINABLE DEV. L. & POL’Y 27, 46 (2006).

<sup>508</sup> See 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1)(A)–(B) (2006).

<sup>509</sup> See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 131 n.21 (1977) (holding BPT standards are based upon the average of the best existing performers in an industrial category or subcategory); *Kennecott v. EPA*, 780 F.2d 445, 448 (4th Cir. 1985) (same); *Am. Meat Inst. v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975) (same); 118 CONG. REC. 33,696 (1972) (statement of Senator Muskie) (“The Administrator [of EPA] should establish the range of ‘best practicable’ levels based on the average of the best existing

provide a clear definition of the “best practicable means” standard, it is arguably too vague because different nations could disagree about what is the best technology for reducing a particular type of pollution.<sup>510</sup>

The “accordance with their capabilities” language in 194(1) is also too indefinite to be enforceable in an ATS suit because it requires a court to consider the state party’s level of affluence compared to other nations, but provides no standards for taking into account a nation’s relative wealth. Article 194(1) suggests a different degree of pollution control would be expected in the affluent United States than the relatively poor Papua New Guinea, but does not explain how much less is expected of Papua New Guinea.<sup>511</sup> One commentator criticizes Article 194(1) by observing that it allows States to claim that they are doing everything possible when “they are capable of doing more.”<sup>512</sup> On the other hand, Professor Charney argues that the qualification is limited because “[i]t is available only if the state actually does not have better means at its disposal.”<sup>513</sup> Following Professor Charney’s interpretation of Article 194, a plaintiff might allege that a defendant could have afforded better pollution control methods even conceding its relative poverty. Yet even under Professor Charney’s interpretation, a court would have to decide whether a State acted in good faith in addressing pollution problems and judging good faith is an inherently subjective evaluation. For example, if a State argued that it was more important for it to spend its income on health care or national defense than pollution control, an American court would likely dismiss the case on act of state or international comity grounds because it would be inappropriate for an American court to second guess the priorities of a sovereign foreign nation.

Additionally, in an ATS suit, it is not clear whether a court applying Article 194(1) would focus on Papua New Guinea’s economic status or the economic capabilities of defendant Rio Tinto. Because scholars have not interpreted Article 194(1) in the same way and there are no international decisions interpreting its provisions, a federal court could reasonably conclude that the Article is too indefinite to apply in an ATS suit even though it clearly represents customary

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performance by plants of various sizes, ages, and unit processes within each industrial category.”); 40 C.F.R. § 125 (2006) (defining BPT as “the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory”).

<sup>510</sup> See Burns, *supra* note 507, at 46–47; Hassan, *supra* note 507, at 670–71.

<sup>511</sup> See Charney, *supra* note 497, at 886 (“[I]n theory, a less developed country with limited capabilities may not be required to take as costly or sophisticated steps as a highly developed state. Arguably, this qualification introduces a double standard for marine environment protection.”); Hassan, *supra* note 507, at 670 (“The insertion of those words gives a license of reluctance to states in relation to their responsibility for taking adequate measures for LBSMP [(Land-based Sources of Marine Pollution)] control, since the assessment of pollution control depends entirely on their capability to do so.”).

<sup>512</sup> Elizabeth Kirk, *International Law and Developing States: Lessons from Vietnam*, 8 GEO. INT’L ENVTL. L. REV. 263, 266 n.18 (1996).

<sup>513</sup> Charney, *supra* note 497, at 886.

international law because of UNCLOS's wide adoption.

Under 194(2) there is a mandatory duty for States to avoid transboundary pollution, but there are still many unanswered questions about the extent of that duty.

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.<sup>514</sup>

According to one commentator, Section 194(2) establishes "an absolute prohibition and is not modified by the particular development condition of the state concerned."<sup>515</sup> On the other hand, the same commentator concedes that "UNCLOS does not specify the exact nature of measures to be implemented."<sup>516</sup> Section 194(2) does not contain the qualifications in Article 194(1), but could be interpreted to incorporate by reference the limitations in Article 194(1).<sup>517</sup> Nor does Article 194(2) explain "the requisite type and degree of harm" to the environment sufficient to constitute a violation.<sup>518</sup> Thus, Article 194(2) is too indefinite to serve as the basis of an ATS suit.

Article 194(3) makes it clear that States have a duty to address all sources of marine pollution, whether from land, air pollution or vessels, especially "persistent" forms of "toxic, harmful or noxious substances." Article 194(3) states:

- (3) The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimise to the fullest possible extent:
  - (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping . . . .<sup>519</sup>

UNCLOS, however, fails to specify which substances are toxic, harmful, or noxious and therefore allows States significant discretion in deciding which substances should be regulated.<sup>520</sup> Accordingly, Article 194(3) is too indefinite to

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<sup>514</sup> UNCLOS, *supra* note 5, art. 194(2).

<sup>515</sup> Kirk, *supra* note 512, at 266.

<sup>516</sup> *Id.*

<sup>517</sup> See Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 242 (1996).

<sup>518</sup> *Id.* at 243–44.

<sup>519</sup> UNCLOS, *supra* note 5, art. 194(3).

<sup>520</sup> See Hassan, *supra* note 507, at 668–69 (discussing similar provision in Article 207(5)).

serve as the basis of an ATS suit.

### 3. Articles 207 and 213: Land-Based Pollution

The UNCLOS provisions for controlling land-based pollution are much weaker than those controlling vessel pollution, dumping, or seabed installation.<sup>521</sup> Article 207(1) requires States to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources . . . taking into account internationally agreed rules, standards and recommended practices and procedures,” but it does not provide specific measures for States to adopt.<sup>522</sup> Boyle has criticized the “taking into account language” because “[i]t leaves states very wide discretion to adopt their own laws and is in effect a power to set national standards uncontrolled by any internationally agreed criteria.”<sup>523</sup> Thus, Article 207(1) is too indefinite to serve as the basis of an ATS suit.

Additionally, Article 207(3) requires States to “endeavour to harmonize their policies in this connection at the appropriate regional level.”<sup>524</sup> The term “endeavour” is far from mandatory and suggests that any alleged good faith effort is enough.<sup>525</sup> Article 207 has led some regions to adopt regional agreements that are arguably more stringent than UNCLOS, but the extent of the duty to do so is far from clear.<sup>526</sup> Therefore, Article 207(3) is too indefinite to serve as the basis of

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<sup>521</sup> See Boyle, *supra* note 490, at 353–54; Hassan, *supra* note 507, at 668 (“Unlike articles dealing with pollution from ships, dumping or seabed installations, Article 207 does not require adherence to any minimum international standards established by international organizations.”); Tanaka, *supra* note 500, at 352 (“[T]he language [for land-based sources] is quite lenient compared with the [vessel pollution] provisions”). *But see* John Warren Kindt, *Solid Wastes and Marine Pollution*, 34 CATH. U. L. REV. 37, 97 (1984) (“Perhaps because land-based pollutants have been recognized as the major cause of ocean degradation, marine pollution via land-based sources received prioritized treatment in the LOS Convention.”). Kindt acknowledges that “[t]he provisions regulating vessel-source pollution are more extensive than those governing land-based pollution; however, this development occurred because of the extensive jurisdictional questions (particularly with regard to the economic zone) that arose during the Third U.N. Conference on the Law of the Sea.” *Id.* at 97 n.443.

<sup>522</sup> UNCLOS, *supra* note 5, art. 207(1) (“States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.”); see Boyle, *supra* note 490, at 354; Kirk, *supra* note 512, at 266.

<sup>523</sup> Boyle, *supra* note 490, at 354; accord Tanaka, *supra* note 500, at 352 (stating that under Article 207, “domestic standards can be lower than international standards”).

<sup>524</sup> UNCLOS, *supra* note 5, art. 207(3).

<sup>525</sup> Hassan, *supra* note 507, at 668 (“In article 207, vague or imprecise language is used in relation to the obligation of states to ‘endeavour to harmonise their policies at the appropriate regional level’ . . . .” (quoting UNCLOS, *supra* note 5, art. 207(3))).

<sup>526</sup> See, e.g., Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1069 [hereinafter OSPAR Convention]; Tanaka,

an ATS suit.

Article 207(4) also declares that States “shall endeavour” to develop global and regional rules addressing land-based pollution, but allows those regulations to “tak[e] into account characteristic regional features, the economic capacity of developing States and their need for economic development.”<sup>527</sup> The qualifications in Article 207(4) allow a State to minimize their obligations to reduce land-based pollution by arguing that standards are low in their region, that they are a developing country too poor to afford adequate pollution control measures, or that their need for economic development outweighs the harm of the pollution.<sup>528</sup> Accordingly, Article 207(4) is too indefinite to serve as the basis of an ATS suit.

Article 207(5) requires States “to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.”<sup>529</sup> UNCLOS, however, does not define which substances are toxic, harmful, or noxious. It gives States discretion in deciding which substances to regulate.<sup>530</sup> Thus, Article 207(5) is too indefinite to serve as the basis of an ATS suit.

Dr. Hassan criticizes Article 207 for failing to “indicate what internationally agreed upon rules and standards are, and what ‘other measures’ States must take into account. Further, it fails to give any indication as to the criteria to determine the suitability of the above standards and measures.”<sup>531</sup> He criticizes the provisions in Article 207 for being “too general” and for “not requir[ing] adherence to any minimum international standards established by international organizations.”<sup>532</sup> He

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*supra* note 500, at 352–53.

<sup>527</sup> UNCLOS, *supra* note 5, art. 207(4). Article 207(4) requires,

States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and their need for economic development. Such rules, standards and recommended practices and procedures shall be reexamined from time to time as necessary.

*Id.*

<sup>528</sup> See David M. Dziedzornu, *Coastal State Obligations and Powers Respecting EEZ Environmental Protection Under Part XII of the UNCLOS: A Descriptive Analysis*, 8 COLO. J. INT’L ENVTL. L. & POL’Y 283, 293 (1997) (“This expectation [of controlling land-based pollution] is limited, however, by the fact that participants must take into account characteristic regional environmental conditions and the economic capacity and developmental needs of any developing countries in a region when establishing criteria and standards.”).

<sup>529</sup> UNCLOS, *supra* note 5, art. 207(5).

<sup>530</sup> Hassan, *supra* note 511, at 668–69.

<sup>531</sup> *Id.* at 668.

<sup>532</sup> *Id.*

concludes that “the obligation [in Article 207] is so imprecisely and broadly formulated as to not have much of a practical effect.”<sup>533</sup> Such an imprecise standard clearly fails to meet the definite content standard in *Sosa*.

Article 213 requires States to “enforce their laws and regulations adopted in accordance with article 207” and to “adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources.”<sup>534</sup> Because of the qualifications in Article 207, one commentator argues that the duty of States to enforce Articles 207 and 213 “rests on each country’s desire to exert a good faith regulatory effort.”<sup>535</sup> This imprecise standard makes Article 213 too indefinite to serve as the basis of an ATS suit.

#### 4. Article 235: Responsibility and Liability

Article 235(1) holds States “responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment,” and declares that “[t]hey shall be liable in accordance with international law.”<sup>536</sup> Article 235 does not provide a clear definition of how to measure liability. Boyle suggests that “Article 235 seems to contemplate the novel possibility of state responsibility for causing damage to the marine environment unconnected to loss or damage to the interests or environment of other states.”<sup>537</sup> He criticizes this broad approach to liability for going beyond *Trail Smelter’s* approach of measuring damages based on the amount of harm transboundary pollution causes another State because it raises difficult questions.<sup>538</sup> He argues that UNCLOS fails to explain how such damages would be measured and who would collect them.<sup>539</sup> He contends that “further development in state practice will be needed if effect is to be given to these still rather general principles.”<sup>540</sup> Such general liability principles are too indefinite for proper enforcement in an ATS suit.

Additionally, Article 235(2) requires States to “ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.”<sup>541</sup> Boyle criticizes Article 235(2) because “there is no attempt to prescribe any

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<sup>533</sup> *Id.*

<sup>534</sup> UNCLOS, *supra* note 5, art. 213.

<sup>535</sup> Kindt, *supra* note 521, at 98.

<sup>536</sup> UNCLOS, *supra* note 5, art. 235(1).

<sup>537</sup> Boyle, *supra* note 490, at 367.

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> UNCLOS, *supra* note 5, art. 235(2).

detailed principles of liability or to provide for specific sources of pollution.”<sup>542</sup> The absence of detailed liability principles in Article 235 raises serious questions whether federal courts should allow UNCLOS to serve as the basis of an ATS action.

Part XV of UNCLOS provides for four possible fora for the compulsory adjudication of disputes: (1) the International Tribunal for the Law of the Sea (ITLOS), which is comprised of 21 judges and is established under Annex VI of the Convention; (2) the International Court of Justice; (3) an arbitral panel established under Annex VII of the Convention; or (4) a special arbitral panel for disputes falling into several specialized categories established under Annex VIII of the Convention.<sup>543</sup> Most of the ITLOS’ decisions have involved requests for the “prompt release” of a vessel seized by a foreign nation or provisional measures in cases not yet decided on the merits.<sup>544</sup>

### 5. *The MOX Case*

There has been one major transboundary pollution dispute under UNCLOS. In 2001, Ireland brought arbitration proceedings against the United Kingdom under Article 287<sup>545</sup> and Annex VII<sup>546</sup> of UNCLOS.<sup>547</sup> Ireland alleged that the United Kingdom was breaching its obligation to cooperate under Articles 123<sup>548</sup> and

<sup>542</sup> Boyle, *supra* note 490, at 368.

<sup>543</sup> UNCLOS, *supra* note 5, art. 287 & annexes VI–VIII; see Burns, *supra* note 507, at 38; see Christoph Schwarte, *Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea*, 16 GEO. INT’L ENVTL. L. REV. 421, 423–24 (2004) (discussing ITLOS). The jurisdiction of special arbitration panels under Annex VIII includes “(1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping . . . .” UNCLOS, *supra* note 5, art. 1, annex VIII.

<sup>544</sup> See e.g., ITLOS, List of Cases, at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited Oct. 2, 2007); Schwarte, *supra* note 543, at 424–39.

<sup>545</sup> UNCLOS Article 287(1) declares in part, “a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: . . . (c) an arbitral tribunal constituted in accordance with Annex VII.” UNCLOS, *supra* note 5, art. 287.

<sup>546</sup> UNCLOS Annex VII specifies arbitration procedures for UNCLOS cases. *Id.* annex VII.

<sup>547</sup> In the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea Request for Provisional Measures and Statement of Case of Ireland (Ir. v. U.K.), 2001 ITLOS 10, ¶ 1 (Int’l Trib. L. of the Sea Nov. 9, 2001), available at [http://www.itlos.org/case\\_documents/2001/document\\_en\\_191.pdf](http://www.itlos.org/case_documents/2001/document_en_191.pdf) [hereinafter *MOX Plant Case*]; see Oren Perez, *Reflections on an Environmental Struggle: P&O, Dahanu, and the Regulation of Multinational Enterprises*, 15 Geo. Int’l Env’tl. L. Rev. 1, 18 n.87 (2002); Tanaka, *supra* note 500, at 381.

<sup>548</sup> Article 123 states:



197,<sup>549</sup> its duty to prevent marine pollution under Part XII<sup>550</sup> of the Convention, and had failed to assess environmental impacts under Article 206 when the United Kingdom built a nuclear reprocessing facility in Cumbria, on the coast of the Irish Sea.<sup>551</sup> The plant would reprocess spent nuclear fuel into a new fuel, known as mixed oxide fuel, also referred to as MOX.<sup>552</sup> The distance between the nuclear site and the Irish coast at its closest point is about 112 miles, both States claimed 200-mile exclusive economic zones over the Irish Sea, and European Commission law authorizes Irish vessels to fish within 6 miles of the site.<sup>553</sup> Ireland requested provisional measures under Article 290(5)<sup>554</sup> from the International Tribunal Law for the Law of the Sea (ITLOS) to prevent or limit the operation of the new MOX plant and to freeze the transport of radioactive materials associated with the MOX

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States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization: . . . (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; . . . .

UNCLOS, *supra* note 5, art. 123.

<sup>549</sup> Article 197 states:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

*Id.* art. 197.

<sup>550</sup> Ireland argued that the United Kingdom had violated Articles 192, 193, 194, 207, 211, and 213.

<sup>551</sup> *MOX Plant Case*, *supra* note 547, ¶ 55–96; see Hassan, *supra* note 511, at 672; Perez, *supra* note 547, at 18 n.87; Tanaka, *supra* note 500, at 381.

<sup>552</sup> *MOX Plant Case*, *supra* note 547, ¶¶ 7–8.

<sup>553</sup> *MOX Plant Case*, *supra* note 547, ¶ 5; see Tanaka, *supra* note 500, at 361.

<sup>554</sup> Article 290(5) states:

Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

UNCLOS, *supra* note 5, art. 290(5).

plant.<sup>555</sup>

ITLOS agreed with Ireland that the Annex VII tribunal had jurisdiction over the dispute, but rejected the provisional measures requested by Ireland because it agreed with the United Kingdom that the harms were not urgent in light of the United Kingdom's promises that there would be no additional marine transports of radioactive material for the plant's operation and no export of MOX fuel until October 2002.<sup>556</sup> Instead, ITLOS provisionally ordered the parties to work together on information exchange, monitoring, and pollution prevention measures concerning the operation of the MOX plant and to each issue reports on these actions by December 17, 2001.<sup>557</sup> The decision appeared to be a political compromise between the United Kingdom's sovereign right to conduct economic activities on its soil, including nuclear processing, and Ireland's legitimate desire for more information about the MOX plant.<sup>558</sup> Because UNCLOS's Part XII provisions are so general, the tribunal issued a vague decision calling for cooperation that failed to specify how the parties were to share information or cooperate.<sup>559</sup>

During 2003, the Annex VII tribunal was scheduled to hear the case on the merits, but it suspended its proceedings when the European Commission objected that the Court of Justice of the European Communities (ECJ) had exclusive jurisdiction over the case.<sup>560</sup> Although not hearing the case on the merits, the tribunal affirmed ITLOS's provisional measures, promulgated supplemental provisional measures recommending that the parties establish an effective intergovernmental mechanism for notification and coordination, and ordered them to submit reports on their compliance with the provisional measures.<sup>561</sup> Despite the orders to cooperate, the parties strongly disagreed about whether each was providing sufficient information and cooperation.<sup>562</sup>

On May 30, 2006, the ECJ held that Ireland should have sued in its court instead of in the United Nation's arbitration system for UNCLOS because the ECJ had exclusive jurisdiction over transboundary pollution disputes within the European Community, including those that violate UNCLOS.<sup>563</sup> The European

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<sup>555</sup> *MOX Plant Case*, *supra* note 547, ¶¶ 122–150; *see* Hassan, *supra* note 511, at 672; Perez, *supra* note 547, at 18 n.87; Tanaka, *supra* note 500, at 381.

<sup>556</sup> Order of Dec. 3, *MOX Plant Case* (Ir. v. U.K.), 41 I.L.M. 405, 414–16 (Int'l Trib. L. of the Sea 2001), available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow "Proceedings and Judgments," "List of Cases," "Case No. 10," and "Order of 3 December 2001" hyperlinks) [hereinafter *MOX Plant Order*]; *see* Hassan, *supra* note 511, at 672; Schwarte, *supra* note 543, at 434; Tanaka, *supra* note 500, at 383.

<sup>557</sup> *MOX Plant Order*, *supra* note 556, 41 I.L.M. at 416; *see* Hassan, *supra* note 511, at 672–73; Schwarte, *supra* note 543, at 435; Tanaka, *supra* note 500, at 383.

<sup>558</sup> *See* Schwarte, *supra* note 543, at 435; Tanaka, *supra* note 500, at 384.

<sup>559</sup> *See* Schwarte, *supra* note 543, at 435; Tanaka, *supra* note 500, at 384.

<sup>560</sup> *See* Tanaka, *supra* note 500 at 390–91.

<sup>561</sup> *Id.* at 392.

<sup>562</sup> *Id.* at 384 n.260, 392, 395.

<sup>563</sup> Case C-459/03, *Comm'n v. Ir.*, 2006 ECJ CELEX LEXIS 238 (2006), available at

Union is a party to UNCLOS, as are all States belonging to the EU.<sup>564</sup> Ireland could seek to sue the United Kingdom for violating UNCLOS before the ECJ.<sup>565</sup>

Although it was cut short before a final decision, the MOX case demonstrates the complexities of UNCLOS and its arbitration system. Assuming UNCLOS codifies customary international law concerning transboundary pollution, the UNCLOS provisions in Part XII for preventing or regulating transboundary pollution are vague and difficult to apply. Even if it had reached the merits of the case, the Annex VII tribunal would have faced very difficult issues in balancing the United Kingdom's sovereign right to exploit its natural resources, including nuclear fuel, and Ireland's legitimate interest in protecting the Irish Sea. Factually, the issue whether the MOX plant was causing harm was far more complicated than the *Trail Smelter* case.<sup>566</sup>

One must seriously question whether American courts are suited to addressing complicated transboundary pollution issues in an ATS suit. In the relatively uncomplicated *Sarei* case, which involved only one polluter, a court would face complicated questions in determining how to measure damages to marine seas, including the Pacific Ocean.<sup>567</sup> There has been a vigorous debate about whether American courts should even address the global problem of climate change because of difficult standing issues involving individual harm, causation, and the capacity of federal courts to remedy the situation.<sup>568</sup> In *Connecticut v. American*

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[http://europa.eu.int/eur-lex/lex/RECH\\_recueil.do](http://europa.eu.int/eur-lex/lex/RECH_recueil.do) (type "2006" in Year field and "04635" in Page number field, then click "Search").

<sup>564</sup> *Id.* ¶¶ 2–17.

<sup>565</sup> *Id.* ¶¶ 126, 138; see Jamie Smyth, *Ireland Acted 'Illegally' by Bringing Sellafield Case to UN*, THE IRISH TIMES, May 31, 2006, at 4 (reporting Ireland's Environment Minister Dick Roche stated that Ireland could sue United Kingdom in the European Court of Justice to stop the MOX plant).

<sup>566</sup> *MOX Plant Order*, *supra* note 556, 41 I.L.M. at 417 (Joint Declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus) ("The dispute between Ireland and the United Kingdom as it appears before the Tribunal is characterized by an almost total lack of agreement on the scientific evidence with respect to the possible consequences of the operation of the MOX plant on the marine environment of the Irish Sea.").

<sup>567</sup> Cases involving the measurement of damages from oil spills illustrate some of the complexities involved in measuring damages in an UNCLOS case. *See, e.g.*, *P.R. v. SS Zoe Colocotroni*, 628 F.2d 652, 672–78 (1st Cir. 1980) (holding damages from oil spill were not limited to loss of market value of the affected property; rather the standard for damages was costs reasonably incurred in rehabilitating the environment, without grossly disproportionate expenditures, and the district court erred in including replacement value of animals killed when it was impractical to replace them until environment healed itself through natural processes).

<sup>568</sup> *Compare* *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (affirming that Massachusetts had standing to challenge EPA's regulation of carbon dioxide from vehicles because it had demonstrated harm from rising sea levels to its coastal areas), *and* *Covington v. Jefferson County*, 358 F.3d 626, 650–55 (9th Cir. 2004) (Gould, J., concurring) (arguing that plaintiffs alleging harm from global impacts of ozone-depleting

*Electric Power*, eight States filed a public nuisance suit in federal district court in Manhattan against several large utilities that emit substantial amounts of greenhouse gases, but the district court dismissed the case under the political question doctrine because the complex policy questions regarding global warming were better suited to resolution by the political branches and were nonjusticiable political questions beyond the limits of the court's jurisdiction.<sup>569</sup> If it is questionable whether American courts should allow tort suits against American utility companies or the EPA, there is a strong argument that American courts should not allow ATS suits that would require them to set pollution limits in sovereign foreign countries because of the intensely negative reaction such suits are likely to provoke in many foreign nations.<sup>570</sup> Instead, nations must negotiate better international agreements to address problems such as global warming and develop effective mechanisms for reducing transboundary pollution. The success of international agreements to limit ozone destroying chemicals demonstrates that it is possible to address transboundary pollution problems without the intervention of American courts.<sup>571</sup>

## VII. CONCLUSION

While the *Sosa* decision promulgates the imprecise standard that modern international law norms are enforceable in an ATS suit only if they are widely accepted and have a definite content comparable to the eighteenth-century norms, the *Sosa* standard is clear enough to prohibit most international environmental law doctrines as the basis of an ATS suit. Because of the inherent complexities of environmental issues, international environmental law doctrines are usually broad

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substances should have standing, although acknowledging that prudential considerations might limit suits in such cases), and Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005) (arguing in favor of standing in at least some climate change suits, but acknowledging contrary arguments), with Blake R. Bertagna, Comment, "Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming, 2006 BYU L. REV. 415 (2006) (arguing against standing in "substantive" global warming cases because of scientific uncertainties, but acknowledging plaintiffs would have a better chance of showing standing in a procedural injury case).

<sup>569</sup> *Conn. v. Am. Elec. Power, Co.*, 406 F. Supp. 2d 265, 271–74 (S.D.N.Y. 2005); Mank, *supra* note 568, at 9–10.; *accord Massachusetts*, 127 S. Ct. 1438, 1463–64 (Roberts, C.J., dissenting) (arguing that global warming "crisis" should be resolved in "the Executive and Legislative Branches of our Government").

<sup>570</sup> Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1938–43 (2007) (arguing ATS suits addressing climate change are politically unacceptable because such suits would require American courts to dictate environmental policy to foreign countries, especially relatively poor developing countries).

<sup>571</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol]; *NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006) (discussing implementation of Montreal Protocol).

and somewhat vague. For example, the Second Circuit in *Flores II* and the district court in *Sarei I* agreed that broad principles such as the “right to life,” the “right to health,” or the right to sustainable development are too vague to be enforced in an ATS suit.<sup>572</sup>

The district court in *Sarei I* and the Ninth Circuit’s withdrawn 2006 opinion are probably correct that UNCLOS has been ratified by so many nations that it codifies customary international law.<sup>573</sup> Even though it has not ratified UNCLOS, the United States appears to accept the Convention’s baseline provisions as such.<sup>574</sup> The wide acceptance of UNCLOS, however, is not enough to make it enforceable in an ATS suit.

Both the district court in *Sarei I* and the Ninth Circuit’s withdrawn 2006 *Sarei* opinion failed to address whether UNCLOS has a definite content. Superficially, the provisions in UNCLOS may appear to be more definite than a concept such as sustainable development. Perhaps the superficial specificity of UNCLOS convinced the district court in *Sarei I* and the Ninth Circuit’s withdrawn 2006 opinion that the Convention codified customary international law that could be enforced through the ATS.

A detailed examination of UNCLOS, however, demonstrates that many of its marine pollution provisions are vague or unclear. For example, it is unclear how much pollution is required or how much harm must result from that pollution to trigger its prohibitions against marine, land-based, or transboundary pollution. Additionally, it is unclear to what extent a poor country such as Papua New Guinea may use less stringent pollution controls than wealthy nations. In the context of an ATS suit, there are additional uncertainties about whether a MNC such as Rio Tinto is expected to use the same pollution control standards in Papua New Guinea as in Australia. As the *MOX* case suggests, applying UNCLOS to complex transboundary pollution problems raises many unanswered questions.<sup>575</sup> On remand, the district court should hold that the UNCLOS claim is not cognizable under the ATS because the content of UNCLOS is not as definite as the norms recognized in 1789.

American courts should generally reject ATS claims based on internal pollution in one country because they generally are not of mutual concern to the international community. Additionally, U.S. courts should generally reject ATS claims based on transboundary pollution because the liability principles in *Trail Smelter* or the ILC’s recent eight draft principles are too vague to meet *Sosa*’s requirement that modern international law principles have a definite content comparable to eighteenth-century claims such as piracy. Deciding whether

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<sup>572</sup> See *Flores II*, 414 F.3d 233, 254–55 (2nd Cir. 2003); *Sarei I*, 221 F. Supp. 2d 1116, 1158, 1160–61 (C.D. Cal. 2002).

<sup>573</sup> See *Sarei I*, 221 F. Supp. 2d 1116, 1160–63 (C.D. Cal. 2002), *aff’d in part, vacated in part, rev’d in part*, 456 F.3d 1069 (9th Cir. 2006), *aff’d in part, vacated in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007), *en banc reh’g granted*, 499 F.3d 923 (9th Cir. 2007); *Sarei II*, 456 F.3d 1069, 1085–86 (9th Cir. 2006).

<sup>574</sup> See *supra* notes 281–283 and accompanying text.

<sup>575</sup> *MOX Plant Case*, *supra* note 547.

transboundary pollution is significant enough to trigger liability requires the consideration of several subjective factors such as the intensity of the pollution, the location of the pollution, an evaluation of the scientific evidence and measuring damages. For example, in the *MOX* case, the United Kingdom and Ireland vehemently disagreed about the harmfulness of the plant.<sup>576</sup> Because of the inherent complexities of transboundary pollution claims, U.S. courts should refuse to allow ATS suits based on such claims. Instead, international, regional, or bilateral courts or tribunals should decide such cases.

The Ninth Circuit's withdrawn 2006 opinion probably offers false hopes to most environmental plaintiffs. Even if other courts had followed the withdrawn 2006 opinion's overly broad interpretation of ATS jurisdiction, most environmental cases are likely to be dismissed pursuant to the following four defenses: (1) the FNC doctrine, (2) the political question doctrine, (3) the act of state doctrine, and the (4) the international comity doctrine. In most cases involving pollution by MNCs, the government has authorized the polluting activity, the pollution has occurred in a foreign country, and most of the witnesses are probably still in that foreign country. These factors tend to weigh in favor of the application of one or more of the four defenses. The Ninth Circuit in its withdrawn 2006 opinion and its 2007 opinion acknowledged that UNCLOS provisions did not clearly rise to the level of jus cogens norms that no nation may violate, and that is probably true of most environmental claims.<sup>577</sup> Even under the withdrawn 2006 opinion's liberal interpretation of *Sosa*'s serious weight standard for SOIs and other statements by the executive branch, there still was a good chance that the district court in *Sarei* on remand would have dismissed the case. If most environmental ATS suits are going to be dismissed eventually under one of the four defenses, it would be more efficient to apply a relatively strict interpretation of the *Sosa* standard and find at the beginning of the case that they lack a definite content comparable to eighteenth-century offenses and should be dismissed.

Developing countries generally need to apply stricter internal pollution control standards, but they must do so under their own initiative rather than through interference by American courts. For example, China has finally recognized the environmental costs of its tremendous growth and is starting to address its pollution problems, although it needs to do far more to reduce pollution.<sup>578</sup> In Papua New Guinea, according to the plaintiffs' own evidence, it

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<sup>576</sup> *Id.* ¶ 1.

<sup>577</sup> See *Sarei II*, 456 F.3d at 1085–86.

<sup>578</sup> See generally Tseming Yang, *Introduction: Snapshots of the State of China's Environmental Regulatory System*, 8 VT. J. ENVTL. L. 145, 145–149 (2007) (discussing China's increasing recognition of environmental problems and mixed record in addressing them); Symposium, *China in Transition: Environmental Challenges in the Far East*, 8 VT. J. ENVTL. L. 145–472 (2007) (same); Edward H. Ziegler, *China's Cities, Globalization, and Sustainable Development: Comparative Thoughts on Urban Planning, Energy, and Environmental Policy*, 5 WASH. U. GLOBAL STUDIES L. REV. 295, 295–322 (2006) (discussing China's plans and mixed success in addressing rapid urbanization and increases

appears that the government is more willing to address pollution issues now than it was in the past.<sup>579</sup>

The ILC's proposal of eight draft principles concerning transboundary pollution suggests that there is some progress toward making States responsible for transboundary pollution,<sup>580</sup> but those principles are too vague to meet *Sosa*'s definite content standard.<sup>581</sup> As the *MOX* case suggests, regional organizations may take a leading role in addressing transboundary pollution.<sup>582</sup> Indeed, UNCLOS in several provisions recognizes the value of regional standards in addressing marine pollution.<sup>583</sup> Existing or emerging international, regional or bilateral courts, tribunals, or organizations are better suited to addressing transboundary claims than U.S. courts in ATS suits.

If lower courts read *Sosa* too broadly and allow too many types of ATS suits, the Supreme Court may react by limiting such suits. The Supreme Court could refine and narrow its comparable to eighteenth-century offense standard, it could give more weight to executive branch pronouncements, or it could impose an exhaustion of foreign remedies requirement. It is unlikely that the *Sosa* majority wanted to open the door to a wide range of environmental ATS cases. The Ninth Circuit's decision to grant a rehearing by the en banc court may reflect its concern about an overly broad interpretation by the three-judge panel opinion, although it is impossible to know until the Circuit issues its opinion in the case. More likely, the majority of the Supreme Court wanted to allow plaintiffs to bring ATS claims alleging serious human rights abuses. As the *Sarei* case demonstrates, cases in the developing world involving alleged environmental violations also often involve alleged human rights abuses. ATS suits should focus on serious human rights abuses that violate well-defined human rights norms rather than complex environmental cases that are simply not comparable to the eighteenth-century baseline set forth in *Sosa*. If international environmental law principles eventually develop into universal, binding, and clearly defined obligations, courts could then recognize them as the proper basis for an ATS suit.<sup>584</sup>

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in energy consumption by encouraging alternative transportation and energy sources).

<sup>579</sup> *Sarei I*, 221 F. Supp. at 1116.

<sup>580</sup> See *supra* notes 472–488 and accompanying text.

<sup>581</sup> See discussion *supra* Part VI.B.

<sup>582</sup> *MOX Plant Case*, *supra* note 547, ¶ 39 (stating that the United Kingdom maintained that the matters were governed by “regional agreements providing for alternative and binding means of resolving disputes and have actually been submitted to such alternative tribunals, or are about to be submitted”).

<sup>583</sup> See UNCLOS, *supra* note 5.

<sup>584</sup> Christensen, *supra* note 43, at 1252.